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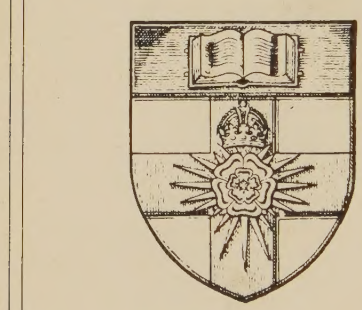

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THE IRISH REPORTS.

VOL. I.—1900.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS,

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND:

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1900.

VOL. I.

CHANCERY DIVISION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND;

BY EDWARD PONSONBY,

116 GRAFTON STREET.

1900.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND WELDRICK.

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The Right Hon. Lord Ashbourne.

Lords Justices of Appeal.

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The Right Hon. Samuel Walker.
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[These Reports will be cited as follows :—[1900] 1 I. R.]

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CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1900.

IN RE THE SOLICITORS' REMUNERATION ACT, 1881: EX PARTE WILLIAM CONNOLLY TO SHERIDAN AND RUSSELL (1).

Appeal.
1898.
Nov. 22.
1899.
Jan. 27.

Solicitor—Bill of costs—Solicitors' Remuneration Act, 1881—*General Order*, 1884, *Schedule* 1, *Part II., Rule* 5—*Scale fee—Lease "not at a rack-rent"—Fine—Taxation of costs.*

A firm of solicitors, acting for the lessor, prepared, settled, and completed a lease of premises for a term of one hundred years, in consideration of a fine of £500 and a rent of £30 per annum: no abstract of title was made out.

Held by the Court of Appeal (Fitz Gibbon, L. J., *diss.*) that the solicitors were entitled to charge £10, being the scale fee on the rent reserved, and also £7 10*s.*, being the scale fee on the fine, the fine being treated as if it were the purchase-money paid on a sale.

Held by Fitz Gibbon, L. J., that the lease was not "a long lease, not at a rack-rent," and that the solicitor was therefore entitled to 30*s.* per £100 on the fine, *i. e.* £7 10*s.*, and to £7 10*s.* per cent. on the rent of £30, *i. e.* £2 5*s.*

In re Robson (45 Ch. D. 71) followed; *Ex parte Ferguson* (21 L. R. Ir. 392) dissented from.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1898.

Ex parte CONNOLLY TO SHERIDAN & RUSSELL.

APPEAL from an order of the Right Hon. The Vice-Chancellor, dated the 1st November, 1898, refusing to review the Taxing Master's decision with respect to a bill of costs furnished by the appellants.

The appellants, acting as solicitors for the lessor, had prepared, settled, and completed a lease from William Connolly to H. Monk, of a public-house in Donaghadee, in consideration of a fine of £500, subject to a rent of £30 per annum for a term of one hundred years.

The solicitors furnished their bill of costs, claiming, according to the Scale given by the General Order, 1884, Schedule 1, Part II., a scale fee of £10 on the rent, and a scale fee of £7 10*s.* on the fine. The Taxing Master disallowed the fee of £7 10*s.*, but allowed the fee of £10, and also allowed two items amounting to 11*s.* 8*d.*, for making a fair copy of the lease and writing a letter. The solicitors applied to the Vice-Chancellor to review the taxation and to direct the Taxing Master to allow the item he had disallowed. The Vice-Chancellor refused the application, following *Ex parte Ferguson* (1).

The solicitors appealed to the Court of Appeal.

Matheson, Q.C., and *Samuel L. Brown*, for the appellants, cited *Ex parte Ferguson* (1); *In re Lacey* (2); *In re Field* (3); *In re Robson* (4); *In re Hellard* (5); *In re Horn and Frances* (6); *In re Webb* (7).

There was no appearance for the respondent.

Cur. adv. vult.

1899. Jan. 27.

HOLMES, L. J. (delivered the judgment of the majority of the Court):—

I know neither the policy of the Solicitors' Remuneration Act, 1881, nor whether the General Order, 1884, was intended for the advantage of solicitors, of clients, or of both. I should be surprised, however, to find that it succeeded in preserving in all cases

(1) 21 L. R. Ir. 392.
(2) 25 Ch. D. 301.
(3) 29 Ch. D. 608.
(4) 45 Ch. D. 71.
(5) [1896] 2 Ch. 229.
(6) [1896] 2 Ch. 797.
(7) [1897] 1 Ch. 144.

a due proportion between the work done and the amount of remuneration. It is almost a necessary incident of professional labour to be unequally rewarded, and any attempt to construe a scale of fees, so as to reconcile it with the principle on which a handicraft is remunerated must end in failure. I am not aware, that the construction which I give to Rule 5 of Part II. leads to a particular kind of business being overpaid, but if it does, it is only what must always happen where the result of a man's skill and industry can be neither weighed nor measured. Schedule 1, Part I. of the Order contains the scale of charges on sales, purchases, and mortgages, the principle adopted being, in the words of section 4 of the Act, "a scale of rates of commission or percentage varying in different classes of business." The variation in this scale is very trifling, being confined to making the per centage payable to a mortgagor's solicitor a little lower than that payable to the solicitor of a mortgagee, vendor, or purchaser. Part II. deals with leases, on the same principle of percentage; but here the variation is more marked.

Leases are divided into two classes which are not exhaustive, but which are certainly not intended to overlap. The first class relates to leases at a rack-rent other than mining or building leases. The leases here referred to must be leases for a term of years, as if this limitation is not introduced there would be included leases for freehold estates, which are expressly mentioned in the second class.

The remuneration for preparing, settling, and completing leases and counterparts within the first class is very moderate, being, for example, £3 15*s*. where the annual rent is £50, £7 10*s*. where it is £100, and £17 10*s*. where it is £500. The second class embraces conveyances in fee, or for any other freehold estate reserving rent (not being a fee-farm grant under the Renewable Leasehold Conversion Act, or the Church Temporalities Acts), building leases reserving rent, other long leases not at a rack-rent, and mining leases. The conveyances in fee or for any other freehold estate reserving rent, referred to in this class, can mean nothing else than fee-farm grants, and leases for lives. These are the only instruments in use in this country that come within the description, and as far as they are concerned it is immaterial

Appeal. 1899. *Ex parte* CONNOLLY TO SHERIDAN & RUSSELL. Holmes, L.J.

whether the rent reserved is a rack-rent or not. The same observation applies to building and mining leases; but in the remaining class of leases included in the category—that is to say, "other long leases," the condition is added "not at a rack-rent." The result is that a lease for years at a rack-rent, whether the term be long or short, is within the first class; and a lease for a long term, where the rent is not a rack-rent, is within the second class. A lease for a short term, not at a rack-rent, is not within either class, probably because it was thought unnecessary to provide a scale for so unusual a case. The remuneration given for the preparation of the instruments in the second class is naturally higher than for those in the first, because, as a rule, they involve greater trouble and responsibility. Still ample room is left for those anomalies which cannot be avoided in a schedule of professional charges. For example, a lease for 999 years reserving a full agricultural rent of £50 a-year, would be paid for under the Scale by the sum of £3 15*s.*, while the remuneration for a fee-farm grant for the same lands at the same rent would be £14. Yet the one is as much a perpetual interest as the other; and it is a matter of accident or fancy in which of the two ways the transaction is carried out.

So far the Scale of charges in Part II. presents no difficulty. Applying it to the present case, we find a lease of a public-house for a hundred years. That is a long lease. We find that while a rent of £30 is reserved, the sum of £500 has been paid as a fine or premium. It follows that the lease is not at a rack-rent. It comes, therefore, within the second class; and according to the Scale therein provided, the remuneration would be £10. This the taxing officer has decided; and he having allowed this item, there has been no application to review his taxation in this respect. The sole question before the Court arises upon the construction of the fifth of the Rules that follow the Scale of charges. It provides that "where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." Apart from authority, there ought, I think, to be no difficulty in

construing these words. Any paraphrase of them would only tend to obscurity. The meaning is that there is to be added to the remuneration hereby provided for the work done, a further sum to be ascertained by reference to what the solicitor would have been entitled to for doing other and different work. The Master of the Rolls in *Ex parte Ferguson and Company* (1), places a construction on this rule which, in my opinion, it cannot bear, namely, that the solicitor may charge as if it were a purchase, provided that he has done the work incidental to a purchase. But the work for which the remuneration is being provided is for preparing, settling, and completing a lease or fee-farm grant and the counterpart thereof, and the additional sum he is to receive, is not for additional work, but a sum to which he would have been entitled if he had done different work, which, *ex hypothesi*, he had not done.

In re Lacey and Sons (2) has, in my opinion, no application. It prescribes that the solicitor to be entitled to the fee must do the work for which the fee is the remuneration. But in cases under Rule 5, the work for which the remuneration is provided has been done; and the rule only relates to the mode in which the amount is to be calculated. If the doctrine of *In re Lacey and Sons* (2) were imported into the fifth Rule, it would have the effect of nullifying the rule altogether, for a solicitor who had prepared, settled, and completed a fee-farm grant or lease, would never in the same transaction have, in addition thereto, perused and completed a conveyance. A similar question to that decided in *Ex parte Ferguson* (1) has since come before three of the Judges of the Chancery Division in England, and each of them has given to Rule 5 the construction which I have suggested. In *In re Robson* (3), North, J., held that the solicitor was entitled in a case similar to the present to a scale fee on the premium as well as on the rent, and that as regards the former, it was to be paid, even although the solicitor had not deduced title. "The rule does not," said the Judge, "say that the lessor's solicitor is to be remunerated as if to the extent of the premium the transaction was a purchase, but that he is to be remunerated by a sum equal to the remuneration on a purchase—a sum to be ascertained by reference to something else,

(1) 21 L. R. I. 392. (2) 25 Ch. D. 301. (3) 45 Ch. Div. 71.

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in the rules to which effect must be given if possible." This case has been followed by Chitty, J., and Stirling, J.; and I presume that the mode of taxation therein laid down is now established in England. There is a difference between the English and Irish purchase Scale, in that while in Ireland there is one payment for all charges (subject to a deduction where a private contract of sale has not been negotiated by a solicitor), in England the charges are subdivided under three heads, and it is held that Rule 5 only relates to the last; but this does not touch the principle of the decisions referred to; nor does it even indirectly affect the amount of the added remuneration in the two countries. In the present case the scale fee on the premium of £500 is £7 10*s.*, which added to the £10 calculated on the rent, makes the entire sum £17 10*s.*—not an excessive payment for the lessor's solicitor to receive in an important transaction of this character.

It was suggested during the argument, and, I believe, the view has been adopted by Fitz Gibbon, L.J., that, although under Rule 5, a sum equal to the scale fee on a purchase of £500 ought to be added to the remuneration calculated on the rent, the taxing officer was wrong in allowing £10 for such remuneration, and that he ought to have reduced the item to £3. I have already pointed out that no exception has been taken to this portion of the taxation, and I am unable to see how this Court can adjudicate upon it. But, even if it were open, I should be prepared to hold that the sum allowed was the proper one.

The scale fee is £3 where the rent reserved by a lease for one hundred years is a rack-rent of £30. It is £10 where the rent of £30 reserved by a similar lease is not a rack-rent. A rack-rent in legal language means a rent that represents the full annual value of the holding. The fact that in addition to the rent reserved a substantial premium has been paid by the tenant is clear evidence that the rent is not a rack-rent. There is certainly nothing in the Scale of fees itself to show that "rack-rent" is used therein in any other sense. Rule 5 neither defines nor uses the term "rack-rent"; and when it speaks of "remuneration hereby prescribed in respect of the rent," it obviously refers to what is prescribed in the Scale of charges as to which there is no ambiguity.

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I confess I do not understand how the circumstance that the consideration of the lease is to be divided into two parts—one being the rent, and the other the money payment—converts a rent that is far below the true annual value of the premises into a rack-rent. I should be unable to hold this even for the sake of insuring symmetry.

I am the less inclined to do so when it would only have the effect of substituting one kind of inequality for another. Had the lease in this case been for a life or lives, the solicitor would have been entitled to a fee of £17 10*s*., even if the rent of £30 is to be treated as a rack-rent. It would be surely anomalous to reduce the remuneration by £7, merely because the parties prefer a term of one hundred years. This anomaly, at all events, is avoided by giving the term "rack-rent" the meaning that it has always borne in English law.

There is also avoided what, in my judgment, is a worse anomaly—an anomaly far more serious than any that has been pointed out by me—the anomaly of having an interpretation differing in England and Ireland of rules and scales of charges practically identical. It may be that, in the words of the Judicature Act, "the difference of the laws and circumstances of the two countries" requires that Irish solicitors must be content with a lower scale of remuneration, at least for some kinds of business, than what is prescribed for their English brethren. If, and where, this is thought advisable, there is no difficulty in indicating the distinction in unambiguous language. But it would be, indeed, unfortunate if, after the Rule Authority had adopted in this country an English scale or an English rule, a variance were afterwards to spring up through a difference in judicial construction. I am glad to think that there need be no such difference in the present case. For the reasons stated I am of opinion that the appeal ought to succeed, that the taxation ought to be reviewed by restoring the whole of the £7 10*s*. disallowed by the taxing officer, and that, as a necessary consequence, the two claims, amounting to 11*s*. 8*d*., allowed by him, but included in the £7 10*s*., ought to be struck out.

Appeal. 1899.

Ex parte Connolly to Sheridan & Russell.

Fitz Gibbon, L.J.:—

We all agree as to the principle upon which this appeal should be decided—namely, that the Solicitors Remuneration Act, 1881, entitles solicitors to fixed and inclusive fees, as distinguished from, and in substitution for, separate charges for specific services, in cases to which the Act applies. In enforcing this principle, we go farther than either the English or the Irish decisions to which we have been referred, though perhaps the English cases may be supported upon differences of language between the English and the Irish Schedules of Fees. The point upon which I am unable to concur with my colleagues is one merely of construction of the Irish Rules, and as to the Part of the Schedule and of the Scale prescribed by the Irish General Order of 1884, which applies to the case before us for the purpose of fixing the "scale of rates and percentage" appropriate to the "class of business" in question.

Rule 2 prescribes that—(*a*) "in respect of sales, purchases, and mortgages completed," the remuneration is to be that prescribed in Part I. of Schedule 1"; (*b*) "in respect of leases or conveyances reserving rent, the remuneration is to be that prescribed in Part II. of the same Schedule"; and (*c*) "in respect of all other business, the remuneration for which is not thereinbefore, or in Schedule 1, prescribed, the remuneration is to be regulated according to the present system, as altered by Schedule 2."

Rule 6 enables a solicitor, before undertaking any business, by writing, to elect that his remuneration shall be according to the present system, as altered by Schedule 2; but, if no election be made, his remuneration is to be according to the prescribed scale. The client has no such election.

Schedule 1, Part I. is headed, "Scale of Charges on Sales, Purchases, and Mortgages," and it allows "to the vendor's solicitor for all charges, including negotiation by solicitor, connected with the sale of property, including preparation of contract, and conditions of sale, deducing title, furnishing searches, and perusing and completing conveyance," 40*s.* per £100 for the first £1000, and £30*s.* per £100 for the second and third £1000, subject to a

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reduction of 10*s.* where the negotiation for the sale has been conducted without the aid of a solicitor.

Part II. of Schedule 1, is headed "Scale of Charges as to Leases or Agreements for Leases at Rack-rent, other than a Mining Lease, or a Lease for Building Purposes." It allows "to the lessor's solicitor, for preparing, settling, and completing lease and counterpart, where the rent does not exceed £100, £7 10*s.* per cent. on the rental, but not less in any case than £3. Where the rent exceeds £100, but does not exceed £500, £7 10*s.* in respect of the first £100 of rent, and £2 10*s.* in respect of each subsequent £100 of rent."

Next follows a third Scale headed, "Scale of Charges as to Conveyances in fee, or for any other Freehold Estates, reserving rent (not being a fee-farm grant under the Renewable Leasehold Conversion Act or the Church Temporalities Act) or Building Leases reserving Rent, or other Long Leases not at a Rack-rent, Mining Leases, or Licenses or Agreements therefor." This Scale allows "to Vendor's or Lessor's solicitor, for preparing, settling, and completing Conveyance and Duplicate, or Lease and Counterpart, where the amount of Annual Rent does not exceed £5, amount of Remuneration £5; where it exceeds £5 but not £50, the same payment as on a rent of £5, and also 20 per cent. on the excess beyond £5; and, where it exceeds £50, but not £150, the same payment as on a rent of £50, and 10 per cent. on the excess beyond £50."

Two observations must be made on these Scales:—*First*, they are not exhaustive: conveyances for nominal or inadequate considerations, and fee-farm grants under the Conversion and Church Acts, are not within any of them. Secondly, while Scales 1 and 2 deal with *all* deeds and leases where the consideration represents the value, and therefore affords a just basis for remuneration by percentage, Scale 3 deals only with some special classes of deeds for inadequate consideration. Therefore leases are not divided into "Leases at a Rack-rent," and Leases not at a Rack-rent, "but *all* Leases at a Rack-rent" are put into Scale 1, and only a special class of "Building Leases, and *other long* Leases not at a Rack-rent" appear in Scale 3. In all cases not included in the

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Scales, the solicitor can charge on the old system, or make his bargain.

Rule 5, attached to Schedule 1, Part II., is the one on which the present question turns. It is in these words:—"Where a conveyance or lease is *partly in consideration* of a money payment and *partly* of a rent—then in addition to the remuneration hereby prescribed in respect of the rent—there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment."

In my opinion the case specified in Rule 5 is one not found in the heading of any *one* of the three scales, but is a hybrid or compound case, partly purchase and partly lease, and to be remunerated accordingly, upon the obviously just principle that there ought to be a higher scale of remuneration for a solicitor conducting a transaction involving title, as distinguished from one involving merely a letting, in which the lessor's title is seldom investigated unless where a fine is paid, or expenditure is contemplated, as in the case of a building lease or other long lease at a rent below the present letting value. But Rule 5 in terms implies that the fine and the rent, taken together, make up the full consideration, and therefore that, as to part, the percentage on the price pays the solicitor, and as to the remainder, the percentage on the rent is to be his remuneration. In other words, he is to be paid partly under Part I., and partly under Scale 2.

The principle of the whole order is that of the Act, namely, to pay the solicitor according to a scale of percentage, and not by items; the real question for us is: What is the remuneration "thereby prescribed in respect of the rent," where, in addition to the rent, the consideration is made up of a fine or money payment?

It appears to me that where the consideration as a whole is *adequate—i.e.* is equal in value to the interest conveyed—one percentage, or a compound percentage, either—(1) on the price where there is *only* price; (2) on the rent, where there is *only* rent; or (3) on the price and on the rent, where the consideration consists partly of the one, and partly of the other; is intended to be given, but in each and every case the consideration on which the percentage

is given is treated as adequate, or full. The meaning of distinguishing between leases *at a rack-rent* and "building leases and other long leases *not at a rack-rent*," and of giving a higher percentage in the latter case, is to prevent the solicitor from being insufficiently remunerated where the rent upon which it is calculated does not represent adequately the consideration for, or the value of, the property dealt with. But it appears to me, from the words of Rule 5, that it is based on treating the compound consideration as being adequate, and if so, *quoad* the part for which the rent is taken, the rent is "a rack-rent." It says, "where a lease is *partly* in consideration of a money payment, and *partly* of a rent," and so far as the property is represented by the money payment, the solicitor is to get a percentage on "a price equal to such money payment." He is to be paid for that part of the property on the highest scale—namely, on that allowed by Part I. It seems to me to plainly follow that when the rent is, in the very words of Rule 5, to be treated as "*the consideration*" for the remaining part of the property, that rent, like the price of the other part, must be regarded as being the adequate consideration for the part of the property which it represents. In other words the rent—*qua* that part of the property—is a rack-rent, *i.e.* an adequate rent, and thus the case defined in Rule 5 of a "lease partly in consideration of a money payment, and partly of a rent," is not a case of a "lease not at a rack-rent," and therefore is not included in the third Scale at all, but is partly under the first, and partly under the second. This is fortified by observing the way in which "leases not at a rack-rent" are mentioned in that third Scale, namely, under the words, "building leases or *other*" *ejusdem generis* "leases not at a rack-rent." The result is harmonious in principle, and it works, in every case that I have been able to imagine, in just proportion to the degree in which the transaction approximates, at one end, to the higher Scale payable upon a sale, and, at the other end, to the lower Scale payable upon a letting, according as the consideration is mostly purchase, or is mostly rent. I am unable to find any case of anomaly or uncertainty, if this principle be adopted. The anomaly of interpretation between England and Ireland is not of my making. The judgment of

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the Court is as inconsistent with the English as it is with the Irish decisions. I illustrate the result of my interpretation by the following instances:—

1. On a sale of property for £2000, the solicitor gets, under Schedule 1, Part I. (deducting 10*s.* for the negotiation), 30*s.* per £100 on £1000, and 20*s.* per £100 on the second £1000; total, £25, under Scale 1.

2. Let £5 per annum rent be added to the consideration, the solicitor then gets under Schedule 1, Part II., £3 more; total, £28, under Scales 1 and 2.

3. On a lease of property at a rent of £100 (worth, say twenty years purchase, or £2000, as before), the solicitor gets £7 10*s.* per cent. on the rent, in all £7 10*s.*, under Scale 2.

4. Add to the consideration a fine equal to one year's rent —a very common case—and the solicitor gets under Scale 2, 40*s.* more; in all £9 10*s.*, under Scales 1 and 2. Case 2 is almost a sale. Case 2 is little more than a lease, and the remuneration is graduated accordingly.

Let us compare these results with what follows from applying to this last case the principle now contended for, viz. that the payment of a fine brings a lease under the Third Scale, and makes it an "other long lease, not at a rack rent." The solicitor will get, for identically the same work, and for what is really only a lease with one year's rent paid in advance, the following remuneration:—For the first £5 of rent, £5; for the next £45, 20 per cent., namely, £9; for the next £50 of rent, 10 per cent., namely, £5; and 40*s.* per cent. on the fine of £100 = £2; total, £21, or *nearly three times* the amount which would be payable to him, *reddendo singula singulis*, as a percentage on the consideration, partly of price and partly of rent, under Scale 1 and Scale 2.

If Scales 1 and 2 are applicable, in the present case the solicitor would receive—first, 30*s.* per £100 on the fine of £500 = £7 10*s.*; next, £7 10*s.* per cent. on the rental of £30 = £2 5*s.*; total, £9 15*s.*, which, in my opinion, is the sum which he is entitled to receive, and which is within 5*s.* of the scale fee allowed by the taxing officer. The appellants claim the £7 10*s.* on the fine, and they claim, in addition, £10 under the Third Scale, upon the rent of £30, making £17 10*s.* in all. The taxing

officer, himself an experienced solicitor knowing the Irish practice, has disallowed the £7 10*s.*, upon the ground that Scale 1 can not apply, because none of the work specified in that Scale was really done, except to the extent of making a fair copy and writing a letter, for which he has allowed 11*s.* 8*d.*. We may take it, therefore, that the scale of remuneration now claimed has not hitherto been paid in Ireland. The Master of the Rolls in *Ex parte Ferguson* (1), and the Vice-Chancellor in the present case, influenced, like the taxing officer, by the apparent want of value for the money claimed, have also disallowed the purchase Scale 1, but they have allowed the "not at a rack-rent" Scale 3, with results approximating in amount to what would be given if, as I suggest, Scales 1 and 2 were applied.

In England the purchase Scale is more subdivided than in Ireland, and, apparently following a similar principle to that which influenced the Master of the Rolls, the Vice-Chancellor, and the Taxing Officer, the English authorities have disallowed, under their rules, all such of the subdivisions of Part I. as mentioned work of a character which was not actually done; in England the sums allowed upon this principle would be considerably less than those which are now claimed here, and, because of the absence of subdivision in our scale, if we apply Scales 1 and 3, we cannot mitigate the amount as it has been mitigated in England. We have to deal with different rules, and we are not bound by the English authorities, and though both the English and the Irish decisions seem to me to fail to give full effect to the principle of payment by percentage, this Court, in supposed obedience to English authority, is now sanctioning a larger charge than would be allowed in England. The application of Scales 1 and 2 in compound cases, would, on the contrary, give full effect to the principle, and would, in amount, work out in every case a justly graduated remuneration.

I am obliged to admit that the point has not hitherto been made either in England or in Ireland, that, in such a case as the present, the percentage on the rent should be taken

(1) 21 L. R. I. 392.

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from the second and not from the third of the scales; but reference to the English cases will show that, owing to the small amounts involved in the particular cases which came before the Courts, this solution of the difficulty may easily have escaped notice. Now that it has been noticed, and in a case in which the amount involved is considerable, I hold myself bound to decide in accordance with what I believe to be the true construction of our own Rules, and I do so all the more readily because that construction would always give the solicitor more remuneration upon a compound consideration than upon one wholly of rent or wholly of price; that it would, in the present case, give him almost the same sum which the taxing officer has allowed him; that it would always graduate his remuneration according to the proportion in which, on the one hand, the onerous work upon a purchase, and, on the other, the less responsible work upon a lease, enters into the transaction; that it would avoid the abnormal results in the way of increasing, and even multiplying, the costs hitherto allowed, which result from the adoption of the principle for which the appellants now contend.

When all is said and done, my judgment rests upon holding that a "lease partly in consideration of a money payment and partly of a rent," is not, within the meaning of the rules or in reality, "a long lease not a rack-rent," *ejusdem generis* with a building lease. Unless it is, Scale 3 is not applicable to it, but Scales 1 and 2 are applicable.

Solicitors: *Sheridan & Russell.*

G. Y. D.

IN THE MATTER OF THE ESTATE OF WILLIAM HENRY BIGGS BALDWIN, OWNER; EX PARTE THOMAS WILLIAM WRIGHT, PETITIONER.

Ross, J.
1899.
July 18, 21.

Mortgage—Priority of costs of enforcing mortgagee's claim.

The costs incurred by a person entitled to an annuity and charge on an estate in successfully enforcing his claim against the owner, who resisted it, take the same rank as the principal sum.

OBJECTION of Henry Thomas Wright to the final schedule of incumbrances, claiming that his mortgage, dated 3rd October, 1881, placed No. 13 on the schedule, should be placed in priority to incumbrance No. 12 on the schedule, being a statutory mortgage, dated the 17th May, 1890, for £169 0*s.* 9*d.*, the amount of the taxed costs of an action brought by Benjamin Little against the owner. The facts appear fully in the judgment.

Moriarty, for the objector.

Morgan Byrne, for the incumbrancer, having carriage.

The following authorities were cited:—*Barnes* v. *Racster* (1), *Hepworth* v. *Heslop* (2), *Wild* v. *Lockhart* (3), *Cutfield* v. *Richards* (4), *Crosse* v. *General Reversionary and Investment Co.* (5), *Wonham* v. *Machin* (6), *Parker* v. *Watkins* (7), *Bank of New South Wales* v. *O'Connor* (8), *National Provincial Bank of England* v. *Games* (9). Daniel's Chancery Practice (1884 edition), p. 1181; Fisher on Mortgages (1897 edition), p. 880; Morgan and Davy on Costs, p. 236.

(1) 1 Y. & C. C. C. 401.
(2) 3 Hare, 485.
(3) 10 Beav. 320.
(4) 26 Beav. 241.
(5) 3 De G., M. & G. 698.
(6) L. R. 10 Eq. 447.
(7) Johns. 133.
(8) 14 App. Cas. 273.
(9) 31 Ch. D. 582.

Ross, J.
1899.

In re BALDWIN'S ESTATE.

July 21.

Ross, J.:—

This is a conflict of priorities between the costs of a chargeant in establishing his right to certain charges, and a puisne mortgagee.

The law is as follows:—Where a mortgagee or chargeant is set at defiance by the mortgagor or owner of the lands charged, costs incurred in enforcing the claim take the same rank as the principal, not merely as against the mortgagor, but against puisne incumbrancers claiming under the mortgagor. This is an evil incident to the position of a puisne mortgagee. He takes, not merely subject to a prior mortgage debt, its principal and interest, but also subject to the possibility that, through no fault of his, heavy costs may be incurred in enforcing the prior claim, which will take precedence of his demand.

But this priority cannot be asserted for all costs incurred in respect of the prior charge. In a case where the claimant's title to the prior incumbrance is contested by a third party, such costs cannot be added to the principal debt. The incumbrancer is in no better position than any other person who is harassed by vexatious or unfounded litigation. He must recover his costs, if possible, from the defendant, but he cannot add them to his incumbrance on the lands.

All that remains for me now is to decide to which class the present case belongs. I have therefore read the pleadings and proceedings in the action, in which the costs were incurred. It arose in this way. Miss Eliza Ellis Biggs, sister of the owner, was entitled to an annuity of £75, charged on part of the lands for sale in the absolute order, and on her marriage she became entitled to a sum of £1000, bearing 5 per cent. interest, charged on certain part of the premises, also included in the absolute order. Miss Biggs was married to Mr. Benjamin Little. The owner's agent, Mr. Wright, refused to pay the annuity and interest to Mr. Little, but professed himself willing to pay Mrs. Little. Thereupon Mr. Benjamin Little brought an action in the Court of the Master of the Rolls to have the annuity and the £1000 declared well charged on the said lands, and the defendant, W. H. Baldwin, ordered to pay to the plaintiff the said annuity and interest on the £1000. The plaintiff's wife was made a defendant

in the suit, and the plaintiff alleged his willingness to make a settlement on his wife if she should so desire.

It is contended on behalf of the objector that the existence of the charges was never questioned; that a dispute broke out between Mr. Little and his wife, as to the right to those charges. The husband claimed them, and the wife claimed them. The defendant alleged that he regarded himself as his sister's trustee, and only withheld payment to enforce his sister's equity to a settlement. It is contended that the fact that the owner refused payment in order to assist his sister's claim was not the same thing as if the owner had refused payment altogether, or denied the existence of the charge. There can be no doubt that a serious dispute existed between the husband and wife, and that the wife ceased to live in the husband's house for a time, and that during this time she asked Mr. Wright, her brother's agent, to pay the annuity and interest to her. In her defence, however, she pleads that she did not object to the same being paid to her husband. She afterwards waived her equity to a settlement.

The reasons of the owner for withholding payment would be an insecure ground on which to rest a decision on the question before me. The Judge of the Court was altogether against the defendant Baldwin; his reasons for withholding payment must have been considered unsatisfactory, and he was ordered to pay the costs of the action. The charges were declared well charged on the lands.

I have accordingly arrived at the conclusion, that the case is to be included in the first class, inasmuch as the owner of the lands, liable to the charges, withheld payment without justification, and rendered the action necessary. I therefore overrule the objection.

Solicitor having carriage: *H. B. Burton.*
Solicitors for the objector: *Thomas R. Wright & Sons.*

W. C. S.

Ross, J.
1899.
Nov. 24.

IN THE MATTER OF THE ESTATE OF HENRY ST. GEORGE OSBORNE, CONTINUED IN THE NAMES OF ARTHUR MACONCHY AND LUCIUS HENRY DEERING, OFFICIAL ASSIGNEES, AND JAMES DENIS, CREDITORS' ASSIGNEE OF THE ESTATE OF SAID HENRY ST. GEORGE OSBORNE, A BANKRUPT, OWNERS; EX PARTE THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY, PETITIONERS.

Land Judge's Court—Practice—Receiver—Life estate—Termination—Discharge of receiver over land, but retention over arrears.

An absolute order for sale of a life-estate had been made, and a receiver appointed. The owner died, and at his death there were arrears of rent due. Upon motion by the person next interested in the lands as owner to discharge the receiver:—

Held, that he should be discharged from over the lands, but retained over the arrears of rent.

APPLICATION on behalf of Henry Ralph Osborne, the present owner of the lands, the life-estate wherein of Henry St. George Osborne, deceased, was ordered to be sold in this matter, for an order, (1) that the petition for sale of the life-estate be dismissed; and that the absolute order for sale should be discharged; (2) that the receiver be discharged; and (3) that the receiver should pay the applicant the proportion of any rents received by him which accrued subsequent to the 22nd August, 1899, being the date of the death of Henry St. George Osborne up to the date of his passing his final account.

The facts were:—The absolute order for sale of Henry St. George Osborne's life-estate in certain lands in the county Meath was made on the 22nd April, 1885; the receiver was appointed on the 18th May, 1885, and the owner Henry St. George Osborne died on the 22nd August, 1899, whereupon the applicant became entitled to the lands as tenant-in-tail, and he subsequently

executed a disentailing deed. There were outstanding considerable arrears of rent up to the death of the late owner.

Leech, for the applicant :—

The owner having died, the applicant is entitled to have the petition dismissed, and the receiver discharged. The receiver has no right to collect the rents; and he cannot sue for the arrears: *Britton* v. *M'Donnell* (1). We object to the dual possession of the land by the present owner and the receiver. The executor of the late owner is alone entitled to sue for the arrears, or the assignees in bankruptcy.

R. Brereton Barry, Q.C. (with him *Christopher Roche*) for the petitioners.

We cannot object to the receiver being discharged from over the lands; although there has been a cesser of the estate, yet there is no cesser of the rights of the estate, *i.e.* the arrears. Up to the gale day preceding the death of the late owner only the receiver could collect the rents; the assignees could not collect them.

In the *Irish Land Commission* v. *Farrell* (2), the Vice-Chancellor directed the receiver over a life-estate, which had determined, to collect all arrears of rent up to and for the gale day next before the death, and discharged him as to all rents subsequently accrued.

Ross, J. :—

Let the receiver be discharged from over the lands, but retain him over the arrears; and give him liberty to receive the apportioned parts of the rents up to the 22nd August, 1899, from the owner, the said owner undertaking to pay over the apportioned part to the receiver. Let each party bear his own costs, as the applicant asked too much.

Solicitors for the applicant: *T. W. Hardman & Sons.*
Solicitors for the petitioners having carriage: *Wm. Roche & Son.*

W. C. S.

(1) 5 Ir. Eq. R. 275. (2) Unreported.

Ross, J.
1899.
July 11.
Nov. 7.

IN THE MATTER OF THE ESTATE OF EMMA ALEXANDER AND MARY SUSAN MAHON, OWNERS, CONTINUED AS TO THE ESTATE AND INTEREST OF THE SAID EMMA ALEXANDER IN THE NAMES OF JOHN ARTHUR MACONCHY AND ALEXANDER KNOX M'ENTIRE, OFFICIAL ASSIGNEES, AND MARMADUKE BELL, CREDITORS' ASSIGNEE OF THE SAID EMMA ALEXANDER, A BANKRUPT, AS OWNERS; SARAH MULVILLE, WIFE OF WILLIAM E. MULVILLE, PETITIONER.

Landlord and tenant—Land Purchase Acts—Redemption of annuity—Land Law (Ireland) Act, 1896, *sect.* 31 (1) (8).

An annuity secured by a term of years is a superior interest, and the owner of the annuity is entitled to be paid the capitalized value on its being redeemed.

OBJECTION of Emma Alexander and Mary Susan Mahon, stating that the lands sold in this matter were subject to an annuity of £100 for the life of the petitioner, who was in her sixty-second year; that the lands having been sold to the tenants under the 40th section of the Land Act of 1896, it became necessary to have the same vested in them, discharged from the annuity; that the arrears due on foot of the annuity had been satisfied by payment or absolute credit; that the owners objected to the payment out of Court of the capitalized value of the annuity, wishing it to be kept in Court during the lifetime of the annuitant; and that taking the guarantee deposit at its fair value the estate was solvent.

The annuity was secured by a term of ninety-nine years.

Oulton, for the petitioner:—

The annuity must be redeemed under sect. 31 of the Land Law (Ireland) Act, 1896, and the annuitant is entitled to have

the capitalized sum paid out to her, though it would take all the money now in Court: *Butler's Estate* (1); Conveyancing Act, 1881, sect. 44.

Leech, for the objectors:—

The practice in this Court is always not to pay out the capitalized value of an annuity, but to pay out the dividends, and, if necessary, to draw on the capital: *In re Nicholson's Estate* (2); and the Act of 1896 does not alter that practice. An annuity secured by a term of years is not a superior interest: see sect. 31 (8). Even if it is it should be "satisfied," under the old practice, and not redeemed: sect. 31 (1).

Oulton, in reply:—

"Satisfied," in sect. 31 (1) applies to the different superior interests mentioned in sub-sect. (8), such as "covenants," "conditions."

Ross, J.:—

I think there is no doubt that the annuity is a superior interest; I am directed to redeem superior interests when selling under the Act of 1896. Mr. Leech lays stress on the word "satisfied"; but I think that that argument is met by what Mr. Oulton points out that superior interests include not only rent and other money payable as set out in sub-sect. 8 of sect. 31, but also other things, covenants, conditions, &c., to which the word "redeemed" is not properly applicable. Then as to the other point, I cannot see that the fact that the annuity is secured by a term of years makes any difference; the term is attendant on the annuity.

Solicitor having carriage: *Stapleton.*
Solicitors for the owners: *Hardman & Sons.*

W. C. S

(1) 31 I. L. T. 85. (2) I. R. 11 Eq. 177.

M. R.
1899.
June 27.

MACONCHY *v.* THE BANK OF NEW ZEALAND.

(1895. No. 886.)

Practice—Costs—Taxation between party and party—Instructions to sue—Instructions for briefs—Particulars—Fees to counsel—Expert evidence—Witnesses' expenses—Discretion of Taxing Master—Principles of taxation—Order LXV., Rule 64, *Rules of Supreme Court* (*Ireland*), 1893.

In a case of exceptional difficulty, necessitating much antecedent investigation, and which involved a charge of forgery, after a protracted hearing before the Master of the Rolls an order was made directing an issue to be tried on the question of forgery.

The case resulted in a verdict for plaintiffs, who were the assignees in bankruptcy of J. On the taxation of costs between party and party, the plaintiffs claimed a lump sum of £125 for instructions to sue. The Taxing Master made a ruling for particulars, and particulars were furnished claiming for certain steps and proceedings in the bankruptcy matter of J., taken prior to the institution of the action. The Taxing Master disallowed these charges as against the opposite party, and allowed 10*s.* for instructions to sue:—

Held, on motion for review of taxation, that the fee of 10 shillings was quite inadequate, considering the nature and circumstances of the case, and that the matter should be referred back to the Taxing Master with a direction to allow a reasonable remuneration (ascertained with due regard to the fees fixed by the scale for solicitor's time) for the time which he should be satisfied was actually and reasonably occupied by the solicitor in person or by his clerks in acquiring the information necessary for the case; and that if the Taxing Master required particulars there should be a request to furnish them on this basis, as a bare direction to furnish particulars was insufficient.

A similar direction was given in reference to a claim for £300 for instructions for brief on the original hearing, as to which the Taxing Master had allowed £50.

The Court refused to interfere with the discretion exercised by the Taxing Master in disallowing a fourth counsel, or in the reduction of refresher fees.

The solicitor of the plaintiffs paid a fee of 50 guineas to each of two senior counsel, and 40 guineas to junior counsel on the hearing before the Master of the Rolls, and further fees of a similar amount to each counsel on the trial of the issue. The Taxing Master allowed, in each case, 35 guineas to senior counsel and 25 guineas to junior counsel.

Held, that the Court, taking into consideration both the proceedings on the trial and the issue, would not interfere with the ruling of the Taxing Master as regards the briefs on the first hearing; but that the full fee of 50 guineas should be allowed to each senior counsel and a proportionate fee to junior counsel on the trial of the issue.

Expenses of expert witnesses, in their character as such, cannot be allowed as between party and party on a rate exceeding that fixed by the scale relating thereto.

MOTION on behalf of the plaintiffs for an order to review the taxation of certain items of the plaintiffs' costs.

The plaintiffs as the official assignees in bankruptcy of John T. Hamerton, deceased, claimed that the defendants, the Bank of New Zealand, should be declared trustees for the plaintiffs of the sum of £1583, which was in 1878 placed with the defendants as a fixed deposit bearing interest at 4 per cent., and for which the said John T. Hamerton received a deposit receipt, which was twice renewed, the last renewal bearing date 26th July, 1882, at the aforesaid rate of interest, subject to notice of withdrawal as provided. On 19th August, 1887, the defendants, in pursuance of notice of withdrawal and request for issue of a new deposit receipt in favour of the Munster and Leinster Bank, purporting to be signed by John T. Hamerton, and of an indorsement on the deposit receipt in the name of the said John T. Hamerton, transferred the deposit receipt into the name of the Munster and Leinster Bank, Limited, and the amount of the deposit receipt was paid by the defendants to the Munster and Leinster Bank.

John T. Hamerton was adjudicated a bankrupt on 30th January, 1891, and died on 22nd July, 1893. The principal questions arising for decision in the case were as to whether the signature to the notice of withdrawal and request for the issue of a new deposit receipt, and the indorsement on the back of the deposit receipt dated 26th July, 1882, were in the proper handwriting of John T. Hamerton, deceased.

On 28th April, 1896, an order was made adding the Munster and Leinster Bank as third parties in the action.

The action was heard before the Master of the Rolls on 17th, 18th, 19th, and 23rd February, 1898, on which last day it was directed that an issue should be tried before the Court and a special

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jury of the County of Dublin. By order dated 26th April, 1898, it was ordered that the following question should be tried, viz. :— "Was the deposit receipt of the Bank of New Zealand, dated 26th July, 1882, indorsed by John Taylor Hamerton, deceased?" The hearing of the issue lasted for five days, and the jury found that the deposit receipt in question was not indorsed by the deceased. The defendants having declined to be bound by this verdict, the original action was re-entered for argument before the Master of the Rolls on May 7th, 1898, and judgment was given for plaintiffs for £1583, and 6 years' interest, amounting in all to £2010 8*s.* with costs.

On the taxation of costs between party and party, plaintiffs claimed £125 for "instructions to sue," as to which the Taxing Master made a ruling requiring particulars generally; and particulars were furnished claiming for correspondence, attendances, conferences, consultations, and other proceedings taken and expenses incurred in the bankruptcy matter prior to the institution of this action, such charges amounting to £117. The Taxing Master refused to allow costs and expenses of this kind as against the opposite party, and allowed only the ordinary fee of 10*s.* for "instructions to sue."

The plaintiffs claimed a lump sum of £300 for instructions for the brief on the original hearing, as regards which the Taxing Master required particulars generally, which were furnished, and he allowed the sum of £50.

The Taxing Master refused to allow the fees of more than three counsel on the trial of the issue. At the time of the original hearing, Mr. Campbell, Q.C., who had been retained for the plaintiffs, was absent on parliamentary duties, and another counsel was retained in his stead. Mr. Campbell was in Dublin at the time of the trial of the issue, and the Taxing Master in his report stated that "it was admitted on behalf of the plaintiffs that if Mr. Campbell had not been in Dublin at the time a fourth counsel would not have been retained for the trial. It therefore seems clear to me that these charges are of a special nature, which cannot be necessarily or legitimately allowed against the defendants. But, in any event, as a matter within my discretion, I would not, without the authority of the Court, have allowed the expenses in question

as I think that the costs of more than three counsel would not be reasonably allowable against the opposite party."

A sum of 35 guineas was allowed to the plaintiffs by the Taxing Master in respect of fees to each of two senior counsel on the original hearing, and a sum of 25 guineas for junior counsel. The solicitor of the plaintiffs had paid, and the plaintiffs claimed to be allowed fees of 50 guineas to each of the two senior counsel, and 40 guineas to the junior counsel.

Instead of 50 guineas paid to each of two senior counsel on briefs on the trial of the issue, the Taxing Master allowed in each case 35 guineas; and 25 guineas to junior counsel instead of 40 guineas.

The refresher fees of 15 guineas to senior counsel and 10 guineas to junior counsel were allowed on taxation at the rate of 8 guineas and 6 guineas, respectively.

The Taxing Master refused to allow expenses for expert witnesses above that prescribed by the scale of fees relating thereto.

Serjeant Dodd, and *A. L. Horner*, in support of the application :—

As to item 1, we claim a special allowance for "instructions to sue." Order LXV., R. 64 (3), which is more general in its application than Order X., R. 3, of the rules of 1878, provides that the Taxing Master may make such further allowance as may be reasonable if he shall consider the scale fee inadequate. The fee of 10 shillings is not a reasonable allowance for "instructions to sue" in a case like this, which was an exceptionally heavy one to get up, and in which the solicitor had many difficulties to contend with prior to the institution of the action. In allowing only 10 shillings, which is a charge applicable only to an ordinary case, the Taxing Master proceeded on a wrong principle, and the Court will interfere to set the matter right.

The fee of £300 claimed for "instructions for brief" on the original hearing is not excessive, considering the difficulty of the case, nor has the Taxing Master made a reasonable allowance

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therefor. In *Rooney* v. *Langtry* (1) £200 was allowed for instructions for brief: Henry on Costs, Part II., pages 102, 103.

As to the fees paid to counsel, they were given on an estimate of the difficulties of the case by the solicitor acting *bona fide*, and are proper fees proportionate to the magnitude and complication of the case, and ought not to have been reduced by the Taxing Master: *Robb* v. *Connor* (2); *Galway Election Petition* (3); *Dyott* v. *Reade* (4); *M'Naughton* v. *Springfield Finishing Company* (5).

As to the disallowance of a fourth counsel, the Taxing Master has exercised his discretion, and he undoubtedly in his report states circumstances which support that conclusion; but the case was one of great magnitude. However, we do not insist strongly on our objection to this disallowance, but leave the matter in the hands of the Court. The Taxing Master was wrong in reducing the refresher fees.

The fees allowed for expert witnesses are inadequate. In taxing the expenses of witnesses the Taxing Master is in *ordinary* cases to "have regard to the following scale"—that is, the scale which the Taxing Master followed; but at the end of clause 11 of Order LXV., R. 64, there is this proviso, "in exceptional cases the Taxing Master may increase the above allowances on special grounds." This was eminently a case for the exercise by him of this power. In this case special fees were properly paid to expert witnesses, and should be allowed between party and party. The Taxing Master in this case has erred on a matter of principle: Henry on Costs, pages 115–117; *Ryan* v. *Dolan* (6).

Matheson, Q.C., and *Shaw*, for the defendants:—

As to the claim for £125 for "instructions to sue," the Taxing Master required particulars which were furnished, setting out certain costs incurred in the bankruptcy proceedings, none of which could be allowed against the opposite party in this action,

(1) 31 L. R. Ir. 175.
(2) Ir. R. 9 Eq. 373.
(3) Ir. R. 7 C. L. 445.
(4) 10 Ir. L. T. R. 110.
(5) 4 Ir. Weekly L. Rep. 203.
(6) Ir. R. 7 Eq. 92.

for they represent assignees' costs in the bankruptcy and costs and expenses between solicitor and client. There is no precedent for allowing such costs and expenses. The Taxing Master in the exercise of his discretion has allowed 10 shillings (he had no materials before him justifying a larger allowance), and the Court will not interfere: *Lynch* v. *Macan* (1); *In re Snell* (2).

As to "instructions for brief" on the original hearing a lump sum of £300 is claimed therefor. Particulars were required and furnished as regards this claim also, and the Taxing Master fixed the amount at £50, as he says in his report "after allowing to the plaintiffs every item which in the best exercise of my discretion and judgment I considered they were fairly and legitimately entitled to against the defendants." The sum of £300 claimed was an estimate, and the Taxing Master was right in asking for particulars and considering what was a reasonable remuneration for acquiring the information necessary to be submitted to counsel. See the order of the Court of Appeal in *The Keighley Laundry Engineering Company, Limited*, v. *Plaine*, dated 13th November, 1896 (unreported); and the order made by Andrews, J., in *Woodley* v. *Ormsby*, dated 21st November, 1898 (unreported). The Court will not interfere with the exercise of a discretion which, we submit, has been properly and reasonably exercised.

As to the fees to counsel, the fees paid by the solicitor of the plaintiffs were in the nature of special fees, and cannot be allowed between party and party: *In re Corless* (3). Refresher fees at the rate of £8 8*s*. for senior, and £6 6*s*. for junior counsel as allowed by the Taxing Master are liberal and proper fees.

The Taxing Master properly disallowed a fourth counsel. The facts here are such as to preclude this allowance. Indeed this claim has been abandoned by the plaintiffs.

The amounts claimed for scientific and expert witnesses exceed the scale of fees allowable. The Taxing Master had no power to increase the allowance, under the circumstances here disclosed: *Re Forrester* (4); Henry on Solicitors' Costs, pages 116, 117; *Thompson* v. *Moore* (5).

(1) 26 L. R. Ir. 385, 388.
(2) 5 Ch. Div. pp. 825, 826.
(3) [1899] 2 I. R. 29.
(4) 32 Ir. L. T. R.
(5) 25 L. R. Ir. 98.

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[The following cases were also referred to: *Jessop* v. *Cusack* (1); *Joynt* v. *Mac Cabe* (2), since reported; *M'Learn* v. *Cooke* (3).]

THE MASTER OF THE ROLLS:

When the matter was opened by Serjeant Dodd, I suggested that where questions of principle were involved it was usually the most convenient course to take the items grouped together under their several heads; and accordingly the case was opened at large as affecting, on principle, four different classes of items. These substantially embrace the matters in dispute, and I do not go into any other points. The bill of costs of the solicitor is a large one, but the case was one of an exceptional character.

During the development of the case I thought it was a proper one for a jury, and, with the consent of the parties, I adopted the course of directing an issue, because, with all desire to save expense and delay, I thought it clear that the case was then shown to be one that ought not to be decided without the assistance of a jury. For the case was of such a character as to raise questions affecting the memory and character of the dead, and what (as it seemed to me) was even more important, the reputation of the living, involving as it did a charge of forgery, if not of perjury. It was, consequently, eminently suited for trial by a jury, and I made an order that an issue should be submitted to a jury specially empannelled under the old system. That necessarily involved a lapse of time between the order for the trial of an issue and its trial. There were difficult and delicate questions to be determined. The case was one requiring most anxious investigation. And though similar questions have been tried before me by a jury in this Court, I cannot of late years recollect one of a similar difficulty.

The chief evidence on behalf of the plaintiffs, the official assignees, was that of witnesses as to handwriting, commonly

(1) 25 L. R. Ir. 244.

(2) 33 Ir. Law Times Rep. 173. In *Joynt* v. *Mac Cabe* the Taxing Master allowed four counsel on taxation between party and party, and the Vice-Chancellor refused to interfere with this exercise of his discretion. See also *Blackwood* v. *Gregg* (Glascock's Rep. 229).—[REP.]

(3) [1899] 1 I. R. 66.

called expert evidence; and although Mr. M'Entire is himself a well-known expert, it was, of course, out of the question that the case should have gone into Court on his evidence alone. The case, as I have said, was one of difficulty and anxiety, and before bringing it into Court involved, on the part of the plaintiffs, a great deal of preliminary care, and could not be rushed on without consideration. In the event, the plaintiffs succeeded, and satisfied the jury, and satisfied me, that there was sufficient evidence that somebody (it was not actually determined who) had forged the documents in question: and, as a result, the defendants, though innocent parties, had to suffer. On the taxation of the costs the Taxing Master allowed half a sovereign to the solicitor of the plaintiffs for all preliminary inquiries before the issue of the writ. That was the fee for "instructions to sue," and the rules provide that in ordinary cases 10*s.* is a proper charge.

And no doubt in ordinary cases, such as in an action by a drawer against the acceptor of a bill of exchange, and in cases of that class, when in ninety-nine cases out of one hundred, the action never becomes a matter for a jury at all, a fee of 10*s.* for "instructions to sue" is not an inadequate one. But in this case for months, I might almost say for years, the solicitor was engaged in anxiously hunting up what evidence he could get as to documents and handwriting, and yet it is said that 10*s.* only should be allowed. I am not blaming the Taxing Master in the matter: he did his best; but this was the way in which he acted. He asked the solicitor to give particulars of the £125, which was the claim under this head; and then the solicitor gives particulars, such as they are. In my opinion the mere direction to furnish particulars was not sufficient. The Taxing Master ought to say what he wants particulars of, because, if particulars were not required, what the "instructions" would include would be the solicitor's taking instructions from the client or from persons on his behalf, and would include all the time, care, and skill reasonably devoted by the solicitor to that purpose. If the Taxing Master had told the solicitor to supply particulars on that basis he would probably have received from him a clear and satisfactory

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statement of particulars, and would have avoided falling into the error of allowing only 10*s.* for "instructions to sue" in this case. He ought to have had a statement from the solicitor representing the time, care, and skill (not the "anxiety of mind," as was in one case claimed for) given and expended by the solicitor in making himself acquainted with the facts of the case before it was launched. But the general request for particulars was acted on by the solicitor also under a mistake. He goes to the file of the Bankruptcy Court, and sets out how he takes this and that step, and consults counsel. He charges for the expenses of Mr. M'Entire going to London. In no sense can that be included under the "instructions to sue." Still, though all the items given in the particulars could not be allowable as such, I will not say that the solicitor might not be at liberty to charge for his time and trouble in obtaining them. Even looking at the particulars which were furnished in connection with the case, it is plain that the solicitor was doing services which would have been properly chargeable for. The particulars were not such as should have been asked. If the Taxing Master thought it proper that this course should be adopted, he should have asked for particulars "of sums chargeable for the time actually and reasonably occupied by the solicitor in person or by his clerks in acquiring information necessary for the case." As regards the first item I shall send it back to the Taxing Master with a request to review the taxation, having regard to those matters I have specified. If he requires further particulars he, or I, if he does not, will specify what they ought to be. He ought not to expect from the solicitor the exact computation of time taken by him, such as might be insisted on in the case of a liquidator of a public company. The case is not an analogous one, and it is not reasonable to expect the same degree of exactness.

As to instructions for brief, I shall send the matter back to the Taxing Master with the same direction.

As to the question in reference to counsel's fees. What was an ordinary action in the course of the proceedings developed into an issue to be tried by a jury, and consequently two sets of fees became payable to counsel in the case, one on the trial of the action before me, and one on the issue directed before the jury. As

to the fees on the trial, of the 50 guineas paid to senior counsel, 35 guineas were allowed, the Taxing Master reducing the fee by 15 guineas. These fees were actually paid. If the trial had ended by a decision in this Court without the issue, I am not at all sure that the fees actually paid to counsel would have been in the least excessive. I am bound, however, to take both the proceedings on the trial and the issue into consideration; and while I feel that I ought not to differ from the Taxing Master as regards the fees allowed on the first hearing, I cannot avoid considering them in reference to the issue. No doubt there were the same questions involved; but I cannot treat the matter as a mere prolongation of the former hearing. The whole case was commenced over again from beginning to end. There were many new inquiries, and different briefing was necessary on the issue, and I am unable to say that the 50 guineas fee to senior counsel was excessive (it was liberal but not excessive), and to that extent I differ from the Taxing Master. That fee must therefore be restored with consequent directions as to the other fees to counsel in the case: as to the disallowance of a fourth counsel I do not differ from the Taxing Master. As regards the refreshers I shall not interfere with his ruling.

There remains the matter of witnesses' expenses—The solicitor was placed in a difficult position in a case which depended largely on expert evidence. I do not think the scale of fees for witnesses' attendance had in contemplation such evidence, that is, purely professional evidence, at all. There is, no doubt, a tack on at the end of the schedule;—"in exceptional cases the Taxing Master may increase the above allowances on special grounds;" but that applies not to any alteration of the character of the witnesses to be allowed for, but permits an increase from 7*s.* 6*d.* to £3 3*s.* if a witness lives not within 5, but, say, 45 miles away. It does not alter the rule that if a party calls a witness he is allowed on taxation only for payments made to him according to scale. It works hardly, as naturally expert witnesses will not attend for the fees payable to them under the taxable scale. Also the tendency of modern decisions is to approximate the costs as between party and party to those as between solicitor and client; but nothing in the rules contemplates the giving of special fees to special witnesses who have not

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personally seen or heard anything of the case, merely because they are experts. Suppose a solicitor says "I cannot get satisfactory evidence for my case in this country, I cannot obtain an expert witness of sufficient eminence, I must have Lord Kelvin or Sir Frederick Bramwell." That would be a matter that the solicitor and his client would have to consider the cost of; they cannot onerate their opponent with the expense by saying "It was prudent to have Lord Kelvin, a man of great engineering capacity, for the trial." That is, no doubt, an extreme case, but the question is always one of degree as regards expert evidence. I have not been referred to any authority as against the opinion I have expressed that the expenses of expert witnesses cannot be allowed for as between party and party on a rate exceeding that fixed by the scale. One way, no doubt, in which some extra expenses as between party and party may be given is for expert witnesses preparing themselves to give evidence. As regards the item of witnesses' expenses I do not differ from the ruling of the Taxing Master. The first and second items will be sent back to the Taxing Master with a direction (and if he requires particulars he may direct them) that in lieu of the sums charged in respect thereof he is to "allow a reasonable remuneration (ascertained with due regard to the fees fixed by the scale for solicitors' time) for the time which he shall be satisfied was actually and reasonably occupied by the solicitor in person or by his clerks in acquiring the information necessary for the case."

As regards counsels' fees the first fees must remain as allowed by the Taxing Master, the 50 guineas fee to each of the two senior counsel, and a proportionate fee to junior counsel on the second trial will be allowed. As regards the fourth item I affirm the ruling of the Taxing Master. The costs of this application will be borne by the parties respectively (1).

Solicitors for the plaintiffs: *Scallan & Company.*

Solicitors for the defendants: *Longfield, Kelly, & Armstrong.*

R. W. L.

(1) As to the claim for "instructions to sue," on the review of taxation, the Taxing Master requested the solicitor of the plaintiffs to furnish particulars in accordance with the terms directed by the judgment of the Master of

IN THE MATTER OF THE LABOURERS (IRELAND) ACTS, 1883 TO 1896, AND IN THE MATTER OF THE TAXATION OF A BILL OF COSTS CLAIMED BY THOMAS VINCENT KEENAN AGAINST ROBERT AGNEW, ACTING SANITARY AUTHORITY FOR THE CASTLEBLAYNEY UNION.

M. R. 1899. Oct. 29. Nov. 14.

(1899. No. 737.)

Practice—Taxation of costs—Labourers (Ireland) Act, 1896 (59 & 60 *Vict. c.* 53), *sect.* 34—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70) *Schedule* 2, *sect.* 29—*Costs of arbitration—Railways (Ireland) Act*, 1864 (27 & 28 *Vict. c.* 71) *sect.* 12—*Costs of conveyances—Review of taxation—Rules of the Supreme Court (Ireland) July*, 1893, *General Order LXV., Rule* 65.

Land was taken compulsorily by a sanitary authority under the Labourers (Ireland) Acts, with which the second schedule of the Housing of the Working Classes Act, 1890, is incorporated. The compensation was duly assessed by an arbitrator pursuant to the said Acts, but no application for costs was made to the arbitrator by the owner, pursuant to section 29 of the said second schedule.

The title of the owner was investigated, and a conveyance executed by him to the sanitary authority. The bill of costs, furnished by the solicitor for the owner, included not only the costs of making title but also the costs of preparing for the arbitration, and attending thereat.

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the Rolls. The solicitor stated that he relied on the particulars already furnished, and declined to furnish any other particulars. Under these circumstances the Taxing Master allowed the sum of £11 10*s.* 6*d.*, in regard to certain items in the particulars already furnished which he considered were properly allowable under the order of the Court.

As to "instructions for brief," by consent of both parties, the Taxing Master allowed the sum of £55 5*s.* in lieu of the sum £50 allowed on the original taxation.

As to the fees to counsel on the trial of the issue, in accordance with the direction of the Master of the Rolls, the Taxing Master allowed £52 10*s.* to each of two senior counsel, and £35 14*s.* to the junior counsel.

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The bill was taxed by the Taxing Master of the Court upon the requisition of the sanitary authority, pursuant to sect. 14 of the Railways (Ireland) Act, 1864. The items relating to the arbitration were objected to on the ground that no certificate had been obtained from the arbitrator, who alone had power to award them.

The Taxing Master allowed the items:—

Held, on an application to review the taxation, that the Court had jurisdiction under Order LXV., Rule 65 of the Rules of July, 1893, to review the decision of the Master, and that the items relating to the arbitration should be disallowed.

ORIGINATING SUMMONS.

This was an application on behalf of Robert Agnew, the acting sanitary authority for the Castleblayney Union under the Labourers (Ireland) Acts, 1883 to 1896, for an order that the taxation of the Taxing Master of certain bills of costs claimed by Thomas Vincent Keenan and others might be reviewed, and that the Taxing Master be directed to disallow the several items in the said bills mentioned in the summons.

The facts of the case were as follows:—

On March 16th, 1897, a Provisional Order in pursuance of the Labourers (Ireland) Acts, 1883 to 1896, authorising the purchase and taking of land otherwise than by agreement, and entitled "The Castleblayney Union Labourers Order, 1897, Part I.," was made by the Local Government Board for Ireland. The said Board on the application of the said Robert Agnew, Local Government Board Inspector, as the acting sanitary authority of the said union, appointed Edmund Murphy, arbitrator, to ascertain the compensation to be paid in respect of the lands authorised to be acquired by the said inspector under Part I. of the said order.

Thomas Vincent Keenan was owner in fee of certain lands within the said union authorised to be so acquired; an arbitration was duly held by the said arbitrator, and the compensation payable to the said Thomas Vincent Keenan was duly assessed.

The solicitors for Mr. Keenan and Mr. Agnew attended at the arbitration, but no application was made by either party to the arbitrator as to the costs incurred in respect of the arbitration. Mr. Keenan's title to the lands was furnished to and investigated

by Mr. Agnew's solicitor, and a conveyance of the lands duly executed by Mr. Keenan.

Mr. Keenan's solicitor furnished his bill of costs to Mr. Agnew, and a requisition to tax them was signed by Mr. Agnew. The bill of costs included items relating not only to the costs of making title and of conveyance, but also to preparation for the arbitration and attendance thereat. Mr. Agnew's solicitor objected to the latter items on the ground that the allowance of the costs relating to arbitration of persons whose lands were compulsorily acquired under the Labourers (Ireland) Acts, 1883 to 1896 was regulated solely by the second Schedule to the Housing of the Working Classes Act, 1890, sect. 29, incorporated with the said Acts by the Labourers (Ireland) Act, 1896, which enacts that the arbitrator, when he thinks fit, upon the request of any party by whom a claim has been made before him, may certify the amount of costs properly incurred of such party in relation to the arbitration, subject to the proviso therein mentioned, with a remedy to the party in case the certified costs are not paid within seven days of the arbitrator's certificate, and that no arbitrator's certificate was produced or obtained.

The Taxing Master overruled these objections, and allowed the items; and this summons was taken out on behalf of Mr. Agnew. The other bills of costs referred to in the summons related to the costs of other owners, whose lands were taken under the provisions of the said order. These bills were framed in the same way, and objected to on like grounds.

No application was made in any of the cases to the arbitrator as to the costs of the arbitration, and he died shortly afterwards.

Donaldson, in support of the summons :—

The arbitrator is the only person who can award costs to the owner of land taken : Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Sch. II, s. 29, which is incorporated by the Labourers (Ireland) Act, 1896, s. 3. This provision is a re-enactment of sect. 13 of the Railways (Ireland) Act, 1851. There is no reported decision on that section. The only costs which the owner is entitled to are costs of conveyances: Lands

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Clauses Act, 1845, s. 83 ; which are taxable by the Taxing Master of the Court under s. 12 of the Railways (Ireland) Act, 1864 : the items objected to are not costs of conveyance, but relate to the arbitration, for which no certificate was obtained from the arbitrator, and, therefore, they should have been disallowed by the Taxing Master.

Drumgoole, for T. V. Keenan :—

This Court has no jurisdiction to review the taxation : s. 12 of the Railways (Ireland) Act, 1864, is the only section giving jurisdiction to tax. In *Tennent* v. *Mayor of Belfast* (1) the Queen's Bench held that it had no jurisdiction to review the taxation of costs of an inquiry before a jury made by the Master under sect. 52 of the Lands Clauses Consolidation Act, 1845 : this decision was followed in England in *Owen* v. *London & North-Western Railway* (2) : the principle laid down in *Owen* v. *London & North-Western Railway* (2) was held applicable to the costs of an arbitration, which by the Lands Clauses Consolidation Act, 1869, are to be taxed and settled by the Taxing Masters of the Superior Courts of Common Law : *Sandback Charity* v. *North Staffordshire Railway* (3). These cases were followed in *Earl of Shrewsbury* v. *Wirral Railways Committee* (4). The principle is that the Court cannot interfere, because the Master is not acting as its officer in any proceeding, but as a person named by the Act.

Donaldson, in reply :—

The only question now raised is that the Court has no jurisdiction to review the taxation. The cases cited have no application where the statute gives a power of review, which, it is submitted, is given by sect. 12 of the Railways (Ireland) Act, 1864 : it provides that "all the provisions of any Act of Parliament, and all rules and regulations of the Courts of Law and Equity in Ireland, relating to the taxation of costs, shall be applicable to such costs so payable by the company in like manner in all respects as if the said

(1) 11 Ir. L. R. 290.
(2) L. R. 3 Q. B. 54.
(3) 3 Q. B. D. 1.
(4) [1895] 2 Ch. D. 812.

company were directly chargeable therewith." There were no such words in the sections on which the cases cited were decided. The intention of this section was to place a company as regards taxation in the same position as if it were a client and a party chargeable with costs: see 12 & 13 Vict. c. 33, s. 2 which dealt with taxation between solicitor and client. The solicitor for the owner here has included in a bill which relates to costs of title items which are not costs of title. "Rules and regulations of the Courts" seem rules and regulations for the time being, *i. e.* the Judicature Rules of 1893, Order LXV., Rule 65 (Costs) gives the Court power to review taxation, and this is "applicable" in the present case.

THE MASTER OF THE ROLLS:— Nov. 14.

This is an application on behalf of Robert Agnew, acting sanitary authority for the Castleblayney Union under the Labourers (Ireland) Acts, to review the taxation of certain items of bills of costs incurred by owners of land in reference to an arbitration for assessing the amount of compensation to be paid by the sanitary authority for the purchase of land required for the purpose of erecting labourers cottages in the said union. I need not repeat the facts. The questions argued were as to the right of the Taxing Master to allow any costs in respect of proceedings before the arbitrator, and whether an appeal lies from his decision. The lands in question were taken compulsorily, under the provisions of the Castleblayney Union Labourers Order, 1897. This order was made pursuant to the Labourers (Ireland) Acts, 1883 to 1896. The Labourers (Ireland) Act, 1896 (59 & 60 Vict. c. 53), s. 3 (1) incorporates the Second Schedule of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70). The twenty-ninth section or clause of that schedule is as follows:—

1. It shall be lawful for the arbitrator, when he thinks fit, upon the request of any party by whom any claim has been made before him, to certify the amount of the costs properly incurred by such party in relation to the arbitration, and the amount of the costs so certified shall be paid by the local authority:

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Provided that—

(*a.*) The arbitrator shall not be required to certify the amount of costs in any case where he considers such costs are not properly payable by the local authority.

(*b.*) The arbitrator shall not be required to certify the amount of the costs incurred by any party in relation to the arbitration, in any case where he considers that such party neglected, after due notice from the local authority, to deliver to that authority a statement in writing within such time, and containing such particulars respecting the compensation claimed, as would have enabled the local authority to make a proper offer of compensation to such party before the appointment of the arbitrator.

(*c.*) No certificate shall be given when the arbitrator has awarded the same or a less sum than has been offered by the local authority in respect of the claim before the appointment of the arbitrator.

2. If within seven days after demand the amount certified be not paid to the party entitled to receive the same, such amount shall be recoverable as a debt from the local authority, with interest at the rate of 5 per cent. for any time during which the same remains unpaid after such seven days as aforesaid."

These sections are in the main a re-enactment of the 13th section of the Railways (Ireland) Act, 1851 (14 & 15 Vict. c. 70), which is incorporated in the Labourers (Ireland) Act, 1883, and the subsequent Acts.

The first matter to be considered is whether, apart from these enactments, there is any power to allow or to tax costs of appearing before the arbitrator. Here there is no award of costs by any one. The arbitrator was never asked to give them. He might have refused to do so, if asked. At any rate he has not decided, as he had power to do, the amount of costs, or even that the applicant should have any costs whatever. No rights to the costs in question exists at common law. No right exists in this case under the statute of Gloucester, which deals with "actions." It is well settled that in cases under special legislation no costs can be given unless it is expressly conferred; and in the case of a right newly conferred the statutory remedy must be followed, and is exclusive. It is

therefore plain that as the arbitrator was not asked to consider the question of costs, there is no power in the Taxing officer or in this Court to award them. Indeed the matters which the arbitrator is directed by the section to take into consideration makes this perfectly clear. He, and he alone, is in a position to decide them. But, while hardly disputing this, Mr. Drumgoole argued that since the Taxing Master in taxing these bills which, as a whole, were within his jurisdiction being costs relating to the title and the approval and execution of conveyances, there is no jurisdiction to entertain an appeal from his determination, even though he has included these items which, taken separately, would not be within his power. In other words, he may have been right, or he may have been wrong, but there is no appeal from him. This turns upon a different section in an Act, also incorporated in the Labourers Acts, viz. the Railways (Ireland) Act, 1864, s. 12 (incorporated by 59 & 60 Vict. c. 53, s. 3). On this section of this Act of 1864 it is argued that no appeal lies from the decision of the Taxing Master. How costs of attendance before an arbitration can be costs of a conveyance was not even suggested. Mr. Drumgoole chiefly relied on the decisions in *Tennent* v. *Corporation of Belfast* (1), and *Sandback Charity Trustees* v. *North Staffordshire Railway Company* (2). In *Tennent's Case* (1) the Court of Queen's Bench was asked to review the decision of the Master of the Court as to the costs of an inquiry held to assess compensation for property taken under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 52 of which Act provided that "the costs of any such inquiry shall in case of difference be settled by one of the Masters of the Court of Queen's Bench." Mr. J. D. Fitzgerald argued that the Court had an inherent jurisdiction over its own officer and could direct him to review his taxation, but the Court held that it had no power in the matter. Blackburne, C.J., delivered the judgment of the Court. He says:—"We are asked by the application made in this case to reverse certain things done by the Master, no appeal being given to this Court by the Act of Parliament referred to; and thus constructively we are called upon to perform a duty which has been imposed on the officer. That duty

(1) 11 Ir. L. R. 290. (2) 3 Q. B. D. 1.

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is thrown on him, not as the officer of the Court, but under the specific directions of that Act of Parliament. The Court have no jurisdiction, there being neither matter nor cause in Court."

In the *Sandback Charity Case* (1) a similar point arose. An arbitration had been held to assess the compensation to be paid by the railway company for taking land belonging to the charity, and an award had been made. The costs were taxed by one of the Masters of the Common Law Courts under 32 & 33 Vict. c. 18, s. 1; which there provides that "where in England under the Lands Clauses Consolidation Act, 1845, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either party so requires, be taxed and settled as between the parties by any one of the Taxing Masters of the Superior Courts of Law." The charity trustees, being dissatisfied with the Master's taxation, applied to the Queen's Bench Division to review it. The application was refused, on the ground that the case was governed by *Owen* v. *London & North-Western Railway Company* (2). The charity trustees appealed.

Brett, L.J., in giving judgment, said :—

"We cannot grant a mandamus, for the Master has never declined to exercise jurisdiction, neither can a writ of *certiorari* be issued, because the Master has jurisdiction, and he has exercised it. Then as to the application to review the Master's taxation. *Owen* v. *London & North-Western Railway Company* (2) decided two things. First, the ground on which the Courts exercise jurisdiction in a matter of taxation is that the office of taxing costs is the business of the Court itself; that this office is delegated to one of its officers, and that the Court has necessarily jurisdiction to control this delegated authority, and, therefore, a right to review the Master's taxation. Secondly, that although a Master of the Court of Queen's Bench was appointed by the legislature to tax the costs under the Lands Clauses Consolidation Act, 1845, the Master in the matter of taxation was not acting as Master, but as a person designated by the Act; and, moreover,

(1) 3 Q. B. D. 1. (2) L. R. 3 Q. B. 54.

as the proceedings were not proceedings in the Court, there was no jurisdiction to review the taxation. I am of opinion that these two points were rightly decided." The Lord Justice then held that the case of compensation awarded by arbitration being precisely similar to the case of compensation assessed by a jury, the principle of *Owen* v. *London & North-Western Railway Co.* (1) applied, and that, therefore, there was no appeal from the decision of the Master.

It will be observed that in the first of these cases the word is "settled"; and there is no reference to any scale on which a regulation pursuant to which the costs are to be "settled." In the *Sandback Charity Case* (2) the words of the Act (32 & 33 Vict. c. 18, s. 1) are "taxed and settled." There is no reference to any appeal, nor to the mode or scale pursuant to which the costs are to be ascertained. No doubt the word "settled" may import an element of finality in these cases, which is absent when the taxation is subject to appeal. But what is the language of the section with which I have to deal? It is as follows:—"In all cases where costs of conveyances shall be payable by the company such costs shall be taxed by one of the Taxing Masters of the Court of Chancery in Ireland upon the requisition of such company; and all the provisions of any Act of Parliament, and all rules and regulations of the Courts of Law and Equity in Ireland relating to the taxation of costs shall be deemed applicable to such costs so payable by the company in like manner in all respects as if the said company were directly chargeable therewith." This is very noteworthy language: "*all* the provisions of any Act, and *all* the regulations . . . relating to the taxation of costs," etc. I am clearly of opinion that these words cannot be confined to the existing statutes and rules, but must extend to all orders and rules *in futuro*, for the time regulating the taxation of costs. The section would be nonsensical, and would lead to absurd results if this were not so. It cannot have been meant that the rules, etc., existing in 1864 should guide the taxation of costs for ever, in regard to this question of one class of conveyances, even though a different system should exist as to

(1) L. R. 3 Q. B. 54. (2) 3 Q. B. D. 1.

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all other similar business. By the Judicature Rules of 1893, Order LXV., Rule 65, it is provided as follows:—

1. "Any party who may be dissatisfied with the allowance or disallowance by the Taxing Master in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate is signed, deliver to the other party interested therein, and carry in before the Taxing Master an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items, or any parts thereof, objected to, and the grounds and reasons for such objections, and may, thereupon, apply to the Taxing Master to review the taxation in respect of the same. 2. Upon such application the Taxing Master shall reconsider and review his taxation upon such objections . . . 3. Any party who may be dissatisfied with the certificate of the Taxing Master, as to any item or part of an item which may have been objected to as aforesaid, may, within twenty-one days from the date of the certificate, or such other time as the Court or Judge, or the Taxing Master at the time he signs his certificate, may allow, apply to the Court or a Judge for an order to review the taxation as to the same item or part of an item, and the Judge may, thereupon, make such order as he may think fit."

These words are wide enoughto include the present case. I think they apply, and that there is an appeal. That being so, I have no difficulty in saying that the items in question are not part of the costs of conveyance within the meaning of the Act: that they are not within the jurisdiction of the Taxing Master to allow; that he was wrong in including them; and that the costs of conveyance must be amended by striking them out.

But inasmuch as the guardians, just as much as the landowners, could have applied to the arbitrators to measure their costs, and did not, and inasmuch as, in substance, and I may say (if such a phrase is applicable to the parties or to the subject-matter) in conscience, the guardians ought to pay these costs, I shall give no costs of this appeal.

Solicitor for R. Agnew: *R. H. Parke.*

Solicitor for T. V. Keenan: *Daniel X. Keenan.*

W. L.

JAMESON *v.* DUBLIN DISTILLERS' COMPANY.

(1899. No. 277.)

V.-C. 1899.

Nov. 15, 16. 17, 18. Dec. 6.

Trade name—Name indicating manufacturer—Two firms of same surname—Name identified with manufacture of one—Right to exclusive use of—User without qualifying words—Tendency to deceive.

A distillery in Dublin was carried on under the name of John Jameson & Son until 1891, when the firm was converted into a limited liability company under the name of John Jameson & Son, Limited (the plaintiffs). Another distillery, founded about the same period in Dublin, was carried on under the name first of William Jameson, then of Jameson and Robertson, and finally of William Jameson and Company, until 1889, when, with two other distilleries, it was acquired by the defendants, the Dublin Distillers' Company, Limited. Previous to that date the labels used for whiskey made at this distillery bore the name "William Jameson & Co." or "W. Jameson & Co.," but in 1898 the defendants altered the label, substituting for those words the description "Jameson's Whiskey." The plaintiffs thereupon required the defendants to revert to the former words, and describe their whiskey as "William Jameson & Co.'s," or even as "Wm. Jameson & Co.'s." The defendants declined to do this, but offered to insert the letter "W." before "Jameson's."

In an action to restrain the defendants from selling their whiskey under the name of "Jameson's Whiskey," without the prefix "William" or some other distinctive indication that the whiskey was not that manufactured by the plaintiffs, the Court was of opinion on the evidence that the name "Jameson's Whiskey" had become so identified with the plaintiffs' whiskey, that the use of it by the defendants, without qualifying words to show that the article was their own make, was likely to mislead purchasers into the belief that it was the "Jameson's Whiskey" made by the plaintiffs; that there was not any indication on the labels that the defendants' whiskey was that made at the distillery of William Jameson & Co., and that the defendants' conduct was likely and tended to so mislead:—

Held, that the plaintiffs were entitled to an injunction.

ACTION by John Jameson & Son, Limited, against the Dublin Distillers' Company, Limited, for an injunction to restrain the defendants, their servants, workmen, agents, and travellers, and representatives, from selling whiskey manufactured by the

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defendants under the name of "Jameson's Whiskey," without the prefix "William" or some other distinctive indication that the whiskey sold by the defendants was not the whiskey manufactured by the plaintiffs; and from selling the whiskey manufactured by the defendants under any other name or description calculated to mislead or confuse the public as to the whiskey sold by the defendants being the whiskey of the plaintiffs' manufacture; and from using the word "Jameson" singly instead of the names "William Jameson & Co." as part of, or in connection with, any labels affixed upon any bottles of whiskey sold by the defendants, or labels issued by them to their customers or others, and from using the name "Jameson" singly in their advertisements or circulars: and for damages.

The statement of claim alleged:—1. The plaintiffs were in 1891 registered as a limited liability company for the purpose of acquiring and carrying on the business of distillers and manufacturers of whiskey as formerly carried on by the firm of John Jameson & Son at their place of business at Bow-street in the City of Dublin: the said distillery was founded about 1780, and in 1810 it passed into the possession of the late John Jameson, and successive generations of his family continued to carry on the said business under the name of John Jameson & Son, until the formation of the plaintiff company who have since carried it on. 2. The whiskey manufactured by the plaintiffs is of superior quality to that ordinarily met with, and has acquired so high a reputation with the public that it commands a higher price in the market than any other whiskey made in Ireland. It is also so well known that for a long period in the spirit trade, and amongst the public generally, the use of the term "Jameson's Whiskey" would only be understood as signifying the whiskey manufactured by the plaintiffs or their predecessors John Jameson & Son, and not the whiskey manufactured by the defendants. 3. In 1889 the defendants were registered as a limited liability company for the purpose of acquiring and carrying on the businesses of three other distilleries, namely, William Jameson & Company, George Roe & Company, and the Dublin Whiskey Distillery Company. The distillery carried on by William Jameson & Company had been in existence for a great number of years, and had been

carried on at Marrowbone-lane, Dublin, first under the name of William Jameson, then of James Jameson, then as Jameson & Robertson, and, finally, as William Jameson & Company; but the whiskey manufactured at the Marrowbone-lane distillery had never acquired so great a reputation with the public as the products of the plaintiffs' distillery; it never commanded so high a price in the market; and it was never known in the spirit trade or amongst the public generally, as "Jameson's Whiskey" without the prefix "William" or some other distinctive indication that would distinguish it from the whiskey manufactured by the plaintiffs; and until the affixing by the defendants of the new label, and the publication by them of the advertisements and posters hereinafter mentioned it was never sold or advertised as Jameson's Whiskey without such prefix or distinctive indication as aforesaid. 4. When the business of William Jameson & Company was purchased by the defendants the label issued and used by William Jameson & Company who bottled their own whiskey was printed in gold and black on white enamelled paper, and had at the top in large gold letters the words "Wm. Jameson and Co.," and underneath "Whiskey Distillers"; and the registered trade mark of the firm, the letter "J" in red on a gold diamond edged with red, between the word "Established" and the date "A.D. 1799," was printed in the centre of the label, and in the lower part was the word "Dublin." This label, with the addition of the words in small type—"This brand is the property of the Dublin Distillers' Company, Limited," was continued by the defendants to denote the whiskey manufactured by them at the Marrowbone-lane distillery, as they retained and used the respective trade marks and labels of the three distilleries purchased by them. 5. The plaintiffs do not themselves bottle whiskey, but they sell large quantities of whiskey to customers for the purpose of being bottled by them, and supply bottle labels free of charge to said customers; the label, so adopted by the plaintiffs and so issued to their customers, has the words "John Jameson & Son," "Dublin Whiskey," printed in large letters on it, and in the middle of the label the word "Established," and the date "A.D. 1780," and between them the plaintiffs' trade mark "J. J. & S." printed in red letters, and underneath the trade mark is the name of the plaintiffs' distillery,

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"Bow-street Distillery." The label itself is also a trade mark of the plaintiffs, and registered as such. These labels are issued by the plaintiffs to their customers in order to certify to the public that the whiskey so bottled by them is the plaintiffs' whiskey, and in order to protect themselves as much as possible from having other inferior whiskeys sold as the manufacture of the plaintiffs. 6. The whiskey manufactured by John Jameson & Son and William Jameson & Company, respectively, was sufficiently identified for the spirit trade and the public by these labels, but towards the close of the year 1898 the defendants adopted a new label which they affixed to bottles containing whiskey bottled by them, and which has printed thereon at the top the words "Dublin Distillers," and under these words, in very large gold letters, the words "Jameson's Whiskey," without the prefix "William," or anything to indicate that the whiskey contained in the bottle is not the manufacture of the plaintiffs. Between the words "Jameson's" and "Whiskey" is a green flag, with a gold harp on it, and over the flag, in small black letters, the words "Harp Brand," and at the bottom of the label, in small black type, are the words "The Dublin Distillers Co., Ltd." The words "Jameson's Whiskey" are the most conspicuous words on the label, and at once strike the eye, and there is no sufficient indication on the label to show that the whiskey contained in the bottle to which the label is affixed is not the manufacture of the plaintiffs, whose whiskey, as above-mentioned, is extensively known in the spirit trade, and amongst the public generally, as "Jameson's Whiskey," for the words in small black letters, "The Dublin Distillers Co., Ltd.," would only imply to the public that the whiskey contained in the bottles so labelled had been simply bottled by, and not manufactured by, the defendants. 7. The plaintiffs say that bottles containing the whiskey of the defendants with the said misleading label affixed to them are being sold to the public by the defendants both in England and Ireland, and the defendants have also extensively advertised their whiskey, using on their posters and other advertisements the name of "Jameson's" in very large letters thereon, without the prefix "William," or anything to indicate that it is not whiskey of plaintiffs' manufacture which was being sold by them; and the plaintiffs aver that

the said misleading labels and advertisements have been adopted by the defendants for the purpose of misleading the public and attracting custom intended for the plaintiffs by representing in the manner above-mentioned that the whiskey so sold by them is the whiskey of the plaintiffs by whose ability and exertions the name of Jameson's Whiskey has acquired the reputation it possesses. 8. The plaintiffs say that the use by the defendants of the name "Jameson" alone on their labels and advertisements is calculated to cause much confusion amongst the public between the manufactures of the plaintiffs and the defendants, and as the defendants sell their whiskey at a lower price than that charged by the plantiffs, the defendants are by the said labels and advertisements causing damage to the plaintiffs' trade, and to the trade of their customers.

The defence stated that when the defendants acquired the business of William Jameson & Company, the label of that firm did not, as alleged, bear the date "1799," but that of "1752," being the year when that business was established; it denied that the defendants' product never acquired as great a reputation as the plaintiffs', or commanded so high a price, or that it was never known in the trade or amongst the public as "Jameson's," or sold as such: it was then impossible for the defendants to show what it was called between 1752 and 1780; but as the plaintiffs' distillery was not founded until 1780 the defendants submitted that the custom of calling the plaintiffs' whiskey "John Jameson" had its origin in the fact that it was the product of a younger firm at a time when defendants' whiskey was known only as "Jameson's." The defendants' business had been established very many years before the plaintiffs' product began to acquire its reputation, and the defendants alleged that if any monopoly of the trade-name of "Jameson's" was to exist, it should rightly belong to and was an asset of the defendants as the older house. The defence continued:—3. Plaintiffs' description of defendants' label is also inaccurate. The defendants have many labels, and that to which the 4th paragraph relates does not bear at the top the words "William Jameson & Co.," but "W. Jameson and Company," and the defendants have exclusively used the letter ◇J◇ as the trade mark on this label, while plaintiffs' trade mark was and is

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"J. J. & S." 4. For some time after defendants purchased the business of W. Jameson & Company, they continued solely to use the said ◇J label of that firm without associating therewith their own title as the Dublin Distillers' Company; but in the course of trading it was seen to be desirable that for some purposes a distinctive label from that used by W. Jameson & Company should be issued, and that same should more prominently show thereon the title of the defendant Company as well as the name of Jameson, and therefore a new label entirely distinct from any formerly in use was devised, combining both names. The said ◇J label of "W. Jameson & Company" was not in any way discontinued; but the new label of which plaintiffs complain was employed in a separate branch of defendants' business, and it is wholly untrue that the said new label was adopted by defendants for the purpose of misleading the public, or of attracting custom intended for the plaintiffs, or in order to represent that the whiskey sold thereunder was that of the plaintiffs, or for any of the purposes complained of in the statement of claim. 5. The said new label is quite dissimilar from any label used by the plaintiffs, and is not calculated to mislead any person into thinking that the whiskey contained in bottles to which it was affixed was the whiskey manufactured by the plaintiffs. The plaintiffs' label contains the words "John Jameson & Son" in large gold letters at the top, and the words "Dublin Whiskey" also in large gold letters at the bottom, while in the middle of the label is printed the plaintiffs' registered trade mark, the letters "J. J. & S." in very large red type. The defendants do not admit that the description of the said new label in the statement of claim is correct. The said label does not in any way indicate that the whiskey contained in bottles bearing it is the plaintiffs' whiskey. The words "Dublin Distillers" at the top, clearly and sufficiently indicate that the whiskey is that of the defendants. The words "The Dublin Distillers' Co., Limited," in clear black type, at the bottom of said label do not imply, and could not be understood to mean that the whiskey was merely bottled by the defendants. When trading firms, other than manufacturers, bottle the whiskey of any particular distiller, the words "Bottled by" invariably precede the name of the bottling firm on the label.

The defence further, in addition to certain traverses, referred to a correspondence before action, in which the plaintiffs requested the defendants to insert the word "William" in their label before "Jameson's." The defendants declined to do this, but, without admitting that there was anything in their label to which they were not fully entitled, they proposed in future issues of the label to prefix the initial "W" to the word "Jameson." The defendants before action made this alteration, and no labels, posters, or advertisements of the kind complained of had since been issued.

The case was tried on oral evidence to which it is unnecessary for the purposes of this report to refer. The result of it and the conclusions at which the Vice-Chancellor arrived are stated in his Lordship's judgment.

Matheson, Q.C., Gordon, Q.C., and *Brunskill,* for the plaintiffs.

The Right Hon. The Mac Dermot, Q.C., Ronan, Q.C., Healy, Q.C., and *Henry Monahan,* for the defendants.

The following were referred to:—*Reddaway* v. *Banham* (1); *Saxlehner* v. *Apollinaris Company* (2); *North Cheshire & Manchester Brewery Company* v. *Manchester Brewery Company* (3); *Turton* v. *Turton* (4); *Burgess* v. *Burgess* (5); *Wotherspoon* v. *Currie* (6); *Massam* v. *Thorley's Cattle Food Compang* (7); *Du Boulay* v. *Du Boulay* (8); *Bodega Company* v. *Owens* (9); *Beazley* v. *Soares* (10); *Singer Manufacturing Company* v. *Loog* (11); *Millington* v. *Fox* (12); *"Singer" Machine Manufacturers* v. *Wilson* (13); *James* v. *James* (14); *Lever* v. *Goodwin* (15); *Holt* v. *Smith* (16); *Hendriks* v. *Montagu* (17); Sebastian, Trade Marks (4th ed.) 249; 1 Seton, Judgments and Orders (5th ed.) 539.

(1) [1896] A. C. 199.
(2) [1897] 1 Ch. 893.
(3) [1899] A. C. 83.
(4) 42 Ch. D. 128.
(5) 3 D. M. & G. 896.
(6) L. R. 5 H. L. 508.
(7) 14 Ch. D. 748.
(8) L. R. 2 P. C. 430.
(9) 23 L. R. I. 371.
(10) 22 Ch. D. 660.
(11) 8 App. Cas. 15.
(12) 3 My. & Cr. 338.
(13) 3 App. Cas. 376.
(14) L. R. 13 Eq. 421.
(15) 36 Ch. D. 1.
(16) 4 *Times* L. R. 329.
(17) 17 Ch. D. 638.

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Dec. 6.

THE VICE-CHANCELLOR:—

The injunction sought in this case is an injunction to restrain the defendants, their servants, workmen, agents, and travellers and representatives, from selling whiskey, manufactured by the defendants under the name of "Jameson's Whiskey," without the prefix "William," or some other distinctive indication that the whiskey sold by the defendants is not the whiskey manufactured by the plaintiffs; and from selling the whiskey manufactured by the defendants under any other name or description calculated to mislead or confuse the public as to the whiskey sold by the defendants being the whiskey of the plaintiffs' manufacture; and from using the name "Jameson" singly, instead of the names "William Jameson & Co.," as part of or in connection with any labels affixed upon any bottles of whiskey sold by the defendants, or labels issued by them to their customers or others, and from using the name "Jameson" singly in their advertisements or circulars.

This injunction is one to restrain the use of a trade name, and does not apply, directly at least, to the interference with a trade mark. The case is to be dealt with irrespective of the Trades Marks Acts, and depends on the doctrine of this Court subsisting before and independently of the protection given by statute to registered trade marks. That doctrine I stated in the case of *The Bodega Co.* v. *Owens* (1), adopting the language of Sir W. M. James, in *Levy* v. *Walker* (2), that "a man has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me.' That is the principle, and the sole principle, on which this Court interferes." I added, that the only right of an individual or a firm to the use of a name, as distinguished from a trade mark, is this, that where the name has been identified by adoption and user with a trader or manufacturer in respect of his trade or business, he can obtain the aid of this Court to restrain

(1) 23 L. R. I. 371, at p. 384. (2) 10 Ch. D. 436, at p. 448.

the use of it by others in such a way as to lead customers or the public to think that the trade of the persons so using it is his trade or business. I adhere to this opinion, and I must inquire how for it applies to the facts of the present case.

The name in this case is "Jameson's Whiskey," without more. The plaintiffs do not object to the use of the name Wm. Jameson & Co.'s whiskey by the defendants in the description of the whiskey made by them, as this is a true description of their make of whiskey; but they do complain of the omission of all distinctive words, on the ground that the use of the name of "Jameson's Whiskey," which is true of both these whiskeys, without adding words to signify that the whiskey is not the plaintiffs' whiskey, but the whiskey made by the defendants, tends to lead purchasers to believe that they are getting whiskey made by the plaintiffs. The plaintiffs are bound to show that the name Jameson's whiskey has become and is so identified with whiskey made by them, that if used by others, without some such distinction, it tends and is likely to lead customers or the public to think that they are getting the plaintiffs' whiskey. They have examined a large number of persons from many places throughout England and Ireland, where they have a very large sale, to prove that this is so. These witnesses are all persons of great experience in the whiskey trade, including wholesale dealers and retailers, and who have ample knowledge of both branches of the trade, and they all concur in the statement that the use by the defendants of the name "Jameson's Whiskey," without more, is misleading, and that it tends to lead customers to suppose that they are getting the plaintiffs' whiskey, though in fact they are getting the defendants'. The plaintiffs' whiskey is shown to be much more known and prized than the defendants', and it commands a much higher price in the market. They stated that when a purchaser asks for Jameson's whiskey, it is generally, and indeed always, save in exceptional cases, taken and understood that he means the whiskey of the plaintiffs' make. The defendants produced some witnesses to show that this is not so, and that when "Jameson's Whiskey" is asked for by purchasers or consumers it would lead to an inquiry which of the two whiskeys was wanted. Their evidence did not appear to me at all so cogent as that of the plaintiffs' witnesses.

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Some of them guarded their statements in a way to reduce their importance seriously. One of the defendants, Mr. John E. Jameson, now Managing Director of the defendants' Company, erred in the opposite direction, and went so far in support of his case as to say that his whiskey was more ordinarily meant by the name of Jameson's whiskey than the plaintiffs'.

It is unnecessary for me to go in detail through all the evidence in the case, or to criticize the statements of the many witnesses examined on this question. I am, on the whole, of opinion that the name of "Jameson's Whiskey" had become so identified with the plaintiffs' whiskey that the use of it by the defendants without qualifying words to show that the whiskey was their own make was likely to mislead purchasers of it into the belief that it was the "Jameson's Whiskey" made by the plaintiffs.

Then the question arises whether the manner in which the defendants have made use of the name or description of "Jameson's Whiskey" has been such as to tend, or be likely, to lead ordinary consumers or other customers to suppose that they are getting the plaintiffs' whiskey. I use the words "tend" and "be likely" advisedly instead of the word "calculated," lest, as I observed in a former case, it might be supposed that by the word "calculated" it was essential that there should be a deliberate purpose or intention to mislead, which, it may now be taken as settled, is not necessary to support a claim for the interference of the Court.

In order to form an opinion on this subject it will be necessary for me to go back somewhat into the history of these firms. I do not purpose to investigate which is the older of these two Jameson firms; for I am of opinion, that the user of the name of "Jameson's Whiskey" may qualify or regulate the original right of the respective parties. The question rightly depends on the nature of the user at the time when the contention between them arose.

The distillery of the plaintiffs was founded some time in the latter half of the last century under the name of John Jameson & Son, and was uninterruptedly carried on under that name till their firm was, in 1891, registered as a Joint Stock Company, under the name of John Jameson & Son, Limited, by which name it has ever since gone. It had also adopted an

abbreviated form and a trade mark of "J. J. & S.," under which it was widely and familiarly known.

The defendants' distillery was founded also in the latter part of last century, under the name of Wm. Jameson, and was carried on in his name for some years, when a partner named Robertson was brought in, and the business was carried on under the name of Jameson & Robertson; and, on Robertson ceasing to be a partner, it was carried on under the name of William Jameson & Co. It so continued till the sale of it to the defendants' Company in 1889, when it was associated with two other distilleries, also purchased by the defendants, and the name was taken of The Dublin Distillers Co., Limited, and the right to use the then existing name of Wm. Jameson & Co. was assigned to the new Company. Up to this time the name of W. Jameson, or William Jameson, was always followed by the words "and Co.," and the name of Jameson was never used without one of the prefixes I have mentioned.

For the first time, in 1898, it occurred to the defendants to make a change in this respect. It is important to bear in mind that it appears that at that time the business of the defendants' Company was not in a prosperous state. Mr. John Eustace Jameson, who had previously been agent for the defendants in England and America, was appointed a Director in the year 1898, and in January, 1899, he was appointed the Managing Director. He stated in his evidence that there was a question of getting a new label for the defendants' business when he was appointed Director, and it is evident that he took a part as Managing Director in getting this new label out. It was that marked A, which is headed Dublin Distillers, under which, in much larger type, is "Jameson's Whiskey" in great prominence, with a green flag and harp; and at the bottom, in much smaller type, is The Dublin Distillers' Co., Limited. There is not any indication in any part of it of the whiskey being made by Wm. Jameson & Co.; but, on the contrary, there is a prominence given to Jameson's Whiskey which is, in my opinion, likely to mislead ordinary purchasers into the belief that it was the plaintiffs' make of whiskey. This tendency would probably exist not only in Dublin and its vicinity, but also in other parts of Ireland, and still more in England and the Colonies, and in foreign countries, where buyers

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would not be so well acquainted with these companies. It is plain that there was some motive to induce the defendants to desire this change. It had been the subject of discussion, and they had the assistance of their new Managing Director, and it does not appear to have been done lightly. In cases of this kind it is always an attempt by the maker or vendor of the inferior article to pass off his goods as those of the maker or vendor of the superior. Here the plaintiffs were beyond question the makers of the superior article, which was selling for thirty or forty per cent. higher in the market; and if they could induce a belief amongst the public that their goods were the plaintiffs' goods they might, for a time at least, have added to their sales or increased their prices. I can find no other motive but this for what they attempted. They also took to posting placards and publishing advertisements, using the name of Jameson's Whiskey as if Jameson's Whiskey was their peculiar, if not exclusive, production. When immediately challenged for this by the plaintiffs, they were unable to maintain their position, and they allege that they gave up, or rather modified, the labels, posters, and advertisements complained of, or substituted others, which they contend are not open to the same objection. The plaintiffs took up the position that they would be satisfied if the defendants would revert to the former description of their whiskey, and designate it as William Jameson & Co.'s whiskey, or even Wm. Jameson and Co.'s whiskey. All they demanded was a clear, unmistakable designation, showing that it was not John Jameson & Sons' whiskey. This was not acceded to by the defendants, who stated that they would only go so far as to introduce a "W." before Jameson in their labels and placards and advertisements. The plaintiffs did not consider this a sufficient protection, and I think they were justified in refusing to accept it. If the defendants desired to deal fairly with the plaintiffs, why should they refuse to accede to the proposal of the plaintiffs, that the defendants should revert to the designation which had existed for so many years without objection? I cannot, on full consideration of the course of conduct adopted and persevered in by the defendants, avoid coming to the conclusion that they made the changes complained of with the view of gaining an advantage for their firm by representing to the public that their whiskey was the Jameson's whiskey which had acquired such

celebrity under the name of "Jameson's Whiskey." But even if such were not the motive by which defendants were actuated, it would be enough for me to hold, as I do, that their conduct was likely to mislead, and tended to mislead, buyers into the belief that the defendants' whiskey was the plaintiffs' whiskey.

I must express my strong dissent from a contention, which I with surprise heard put forward by the defendants, that as it appeared that they only sold to wholesale purchasers, who would not have been likely to be misled by any such attempts on the part of the defendants, the defendants are not liable for the misleading acts of these purchasers, and that the plaintiffs' remedy would have been only against these purchasers. There is neither equity nor morality in such a contention. The fraud is the same, whether it is first hand or second hand. The man who puts it into the power of another to mislead or deceive a third party, is just as liable for the consequences of his conduct as if that conduct were his own.

It was said that there was no proof that any one was actually misled by the defendants' acts; but, in my opinion, it is not incumbent on the plaintiffs to show this, and in many cases it might be impossible to do so. It is enough to show that the conduct complained of tends to mislead ordinary persons.

It was also contended for the defendants that the injunction should not now be granted against them, as they allege that they have already complied with all the rightful requirements of the plaintiffs. Admitting that they were wrong in attempting to use the words "Jameson's Whiskey" without more, they say that they agreed to add to it the only explanatory words to which the plaintiffs are entitled, and that they carried this out as speedily as they could. But they refused to accept the proposal of the plaintiffs that the defendants should revert to the old name of William—or Wm.—Jameson & Co., and would go no farther than to offer to insert the letter W. before "Jameson's." The plaintiffs still required that either "William" or "Wm." should be prefixed to "Jameson's Whiskey," and that the words "and Co." should be added after "Jameson" as an additional distinction, as in the old trade name.

The defendants refused to agree to this; and though there

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were some further communications between the parties, no arrangement was concluded.

I consider that the plaintiffs have not been deprived of the remedy they seek by anything that has taken place during these abortive negotiations.

I shall, therefore, grant a perpetual injunction, as prayed, with costs.

Solicitors for the plaintiffs: *Read & Mac Nab.*
Solicitors for the defendants: *D. & T. Fitzgerald.*

D. M'C. M.

Appeal. 1899.
Feb. 16, 17.

IN THE MATTER OF THE WILL OF LADY MARY SOPHIA MONCK, DECEASED, DATED THE 7TH NOVEMBER, 1878:

MONCK *v.* CROKER.

(1899. No. 600.)

Will—Absolute gift—Executory devise over on a contingency which does not happen—Presumption against intestacy—Clear words required to cut down a clear gift.

A testatrix bequeathed all her estate, except two specified sums, to her sister B., and added the words "I would wish my money to be divided in equal shares after my sister B.'s death between my sister G. and my niece H., should they survive her." G. and H. predeceased B.:—

Held, by the Court of Appeal (Holmes, L.J., *diss.*), reversing the decision of the Vice-Chancellor, that B. took an absolute interest, which, though liable to be divested if G. and H. survived her, became indefeasible on her surviving them.

APPEAL from an order of the Rt. Hon. the Vice-Chancellor of Ireland dated the 4th July, 1899.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, and HOLMES, L.JJ.

The testatrix, Lady Mary Sophia Monck, duly made her last will, dated the 7th November, 1878, in the terms following:—

"This is the last will of Mary Sophia Monck All my estate and effects whether real or personal I give to my sister Henrietta Margaret Monck with the exception of £50 fifty pounds which in token of my affectionate remembrance of her I give to my sister Caroline Letitia Monck considering that in her quiet mode of life such a sum will be most suitable for me to give her also with the exception of £100 which I give to my sister Georgina Ellen Croker

"I would wish my money to be divided in equal shares after my sister Henrietta Margaret Monck's death between my sister Georgina Ellen Croker and my niece Henrietta S. Owen Cole should they survive her and after my sister Georgina Ellen Croker's death her share to go to her eldest unmarried daughter if such there be at the time or in the event of her not surviving my sister Henrietta Margaret Monck"

The will, which contained no punctuation, was in paragraphs as above, ended by giving a few small bequests, and appointing W. B. Smythe, Viscount Monck, and J. M. Royse, executors and trustees of her will.

The testatrix died on the 3rd June, 1881; and Viscount Monck duly proved the will on the 1st August, 1881.

Lady Georgina Ellen Croker died the 20th March, 1887: Henrietta S. Owen Cole died in October, 1887; and Lady Henrietta Margaret Monck died the 8th April, 1899, having duly made her will (which was proved the 9th May, 1899), and thereby appointed Alice Croker her residuary legatee.

The trustees of the will then issued a summons in the Chancery Division, asking: 1, whether the gift in the will to Lady Henrietta Margaret Monck was absolute, or whether it was only for the life of the said Lady Henrietta Margaret Monck; 2, whether, the said testator died intestate as to any part of her estate by reason of the death of her niece, Henrietta S. Owen Cole, in the lifetime of the said Lady Henrietta Margaret Monck.

The summons named the next-of-kin of the testatrix, and the executors and residuary legatee of Lady Henrietta Margaret Monck as defendants.

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The Vice-Chancellor held that Lady Henrietta Margaret Monck only took a life estate, and that there was an intestacy as to the residue. Her residuary legatee appealed from this decision.

Serjeant Campion, Q.C., and *Wakely, Q.C.* (with them *Corvan*), for the appellant:—

The primary bequest in express terms gives an absolute estate to the first legatee, subject only to the subsequent executory devise over on a contingency which never happened: thus in the events that happened, the first absolute estate was left vested, and became indefeasible.

The terms of the primary bequest are most general and extensive: they are unlimited as to time: the portions of the estate and effects, not bequeathed to Henrietta Margaret Monck, viz. the £50 given to Caroline Letitia Monck and the £100 given to Georgina Ellen Croker (being clearly out of corpus) reflect back on the absolute character of the gift from which they are expressly excepted.

The argument that the effect of the words "after . . . death" is to cut down the estate to a life estate is wholly unsustained. The death of Henrietta Margaret Monck is not the contingent event here: death is no contingency: the contingent and divesting event in the executory devise over is *the survivorship of Henrietta Owen Cole*; and it is a settled rule of construction that where there is first an absolute estate followed by an executory contingent gift over, the mere fact that the gift over was to take effect, if ever, on the death of the first legatee, does not cut down the absolute estate to an estate for life: *Jennings* v. *Sparrow* (1); *In re Bourke's Trusts* (2). As Henrietta Owen Cole predeceased Henrietta Margaret Monck, the executory devise over failed in effect, the contingency of survivorship not having occurred. In result, therefore, as regards the moiety of the property contingently bequeathed to Henrietta Owen Cole., the original absolute gift thereof remained vested and indefeasible, and that moiety alone is the subject-matter of this appeal.

(1) 17 Jur. (N.S.) 433. (2) 27 L. R. Ir. 573.

The argument of the respondents ignores the vital principle of an executory devise over, and the distinctive difference between it and a contingent remainder. The executory devise over never regulates the quantity of the previous bequest; it simply divests and defeats that bequest, if the event occur, and leaves it unaffected, absolute, and indefeasible, if the event does not occur. In *Lyon* v. *Mitchel* (1), it is said:—"It is very material to advert to the vital principle on which an executory devise depends. It is not to take effect like a remainder expectant on the regular termination of the prior estate: if it were so, then, certainly, the remainder taking effect, would regulate the *quantum* of the first estate; but the very principle of executory bequests is, that a contingency, if properly limited, is to arise, the effect of which is to defeat the prior estate—to interrupt it in its intended extent—to terminate it—to raise a new use—a thing that could not be done formerly; for where you had once disposed of the absolute interest in it, you could not, formerly, have made any subsequent disposition of it: that is the whole effect of executory devises and bequests; to provide for the contingencies of a family, after you have given the fee or absolute interest, in a certain event it is to be defeated, and to give way to, open, and let in, a new use—it is the whole doctrine of uses and executory devises and bequests, and arises on a principle that it is to defeat, destroy, and interrupt, and give a new course to the prior estate. The prior estate being absolute in one event, does not at all prevent its going over in another event. . . . It is perfectly immaterial what is the duration of the first estate, or in what words it is given . . . The validity and extent of the first estate is to be governed by the words that give it, and not by the words of limitation over, unless where they bear upon and unite with and tend to affect the construction of the prior words."

When the contingent event occurs in such a case, its operation is not to convert a prior absolute estate into an estate for life; it is simply to divest or destroy the first general bequest *pro tanto*.

In *Crozier* v. *Crozier* (2) the words of contingency "should there be any," are very similar in arrangement, position, and

(1) 1 Madd. p. 480. (2) L. R. 15 Eq. 282.

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effect to the words "should they survive." That case is a conclusive authority in our favour. *Joslin* v. *Hammond* (1) was cited in *Crozier* v. *Crozier* (2), and was practically overruled by James, L.J.

The order of the Vice-Chancellor virtually declares that the testatrix died intestate as to her entire property save the life estate given to Henrietta Margaret Monck. The construction we contend for gives effect to every part of the will, and makes an effectual disposition of all the property. The Court leans against intestacy if any other reasonable construction can be adopted. The well-settled rule is that where (as here) there is first a clear and unambiguous bequest, that bequest cannot be cut down by a subsequent provision unless the latter is equally clear and unequivocal.

[They also cited *Jones* v. *Davies* (3); *Eaton* v. *Barker* (4); *Jackson* v. *Noble* (5); *Harrison* v. *Foreman* (6).]

Matheson, Q.C., for the respondents (the next-of-kin of the testatrix):—

On the true construction of this will Henrietta Margaret Monck took a life interest only in the property bequeathed by the testatrix. "Where there is a gift to A., indefinitely, followed by a gift at his decease, A. will take only a life interest": Theobald on Wills, p. 530; *Constable* v. *Bull* (7); *Joslin* v. *Hammond* (1), where the language of the will is very similar to that used here; *Waters* v. *Waters* (8); *Re Adam* (9); *Re Graham's Will* (10); *Bibbens* v. *Potter* (11); *Re Houghton* (12); *Reid* v. *Reid* (13).

In *Crozier* v. *Crozier* (2) the contingency was that there should be children living to take on the legatee's death, and this was part of the event upon which the gift over was to take effect; as there were no such children, the original gift to the legatee remained. In the same way *Eaton* v. *Barker* (4); *Harrison* v.

(1) 3 M. & K. 110.
(2) L. R. 15 Eq. 282.
(3) 28 W. R. 455.
(4) 2 Coll. 124.
(5) 2 Keen, 590.
(6) 5 Ves. 207.
(7) 3 De G. & Sm. 411.
(8) 26 L. J. Ch. 624.
(9) 14 W. R. 18.
(10) 33 Beav. 470.
(11) 10 Ch. D. 733.
(12) 50 L. T. 529.
(13) 25 Beav. 469.

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Foreman (1); and *Jones* v. *Davies* (2) are distinguishable. In all these cases part of the contingency on which the gift over was to take effect was that other members of a class, of which the original legatee was also a member, should survive to take, and as all the other members predeceased the legatee it was held the contingency did not happen, and the gift became indefeasible in the original legatee. But here the gift over is "after the death" of the legatee, and the survival of Henrietta S. Owen Cole is not part of the contingency.

Re Bourke's Trusts (3) is in my favour.

O'Connor, Q.C., for the trustees.

LORD ASHBOURNE, C.:—

Feb. 17.

This is one of those cases where when called on to construe a will, the mind of a Judge inclines at different times to different conclusions according as he views the language of the testator in the differing side-lights thrown by the authorities. However, during the careful arguments which we have just heard I have reached a conclusion which is satisfactory to myself, and which I think the testatrix would herself adopt as giving the true construction of her intentions.

This lady commenced her will by saying that she gave to her sister Henrietta "all her estate and effects whether real or personal," with two exceptions, the mention of which renders more emphatic her intention to deal with her entire property, and to dispose out and out of everything over which she had a power of disposition. The question we have to decide arises upon the next clause—"I would wish my money to be divided in equal shares after my sister Henrietta Margaret Monck's death between my sister Georgina Ellen Croker and my niece Henrietta S. Owen Cole should they survive her." Mr. Matheson says that on the authorities, if an absolute interest is apparently given to a legatee in the first instance, and that gift is followed by another of the same subject-matter introduced by the words "after the death of" the first named legatee, the use of those words cuts down the

(1) 5 Ves. 207. (2) 28 W. R. 455. (3) 27 L. R. Ir. 573.

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apparently absolute interest to a life estate. Mr. Serjeant Campion argues that an absolute estate was given to Henrietta Margaret Monck in the first instance, and contends that these superadded words amount to an executory devise over in a certain specified event, and that there is nothing to divest the absolute interest first given until the happening of that event. The learned Serjeant strongly supported this view by pointing out that it secures the complete disposition of all the testatrix's property which (as I have mentioned) the earlier clause shows she intended to make, while the construction put on the clause by Mr. Matheson leads to a blank intestacy after the life interest which it gives to Henrietta Margaret Monck.

In my opinion Serjeant Campion's construction is the sound one. I think the words, "should they survive," must be read as equivalent to, "in the event of my sister Georgina and my niece Henrietta Cole surviving." If that is so, there is then nothing to take away the absolute interest already given until the contingency happens. In the case of the moiety left to Henrietta S. Owen Cole, the contingency did not happen, and thus the interest given to Henrietta Margaret Monck became indefeasible in that moiety. The devolution of the Croker moiety I do not think it necessary to follow.

I do not intend to go through the authorities—to read them, no doubt, would afford an intellectual treat—but to attempt to reconcile them might lead to an intellectual puzzle. However, there is a case decided by James, L.J., to which I will refer—no one will venture to question his authority. In *Crozier* v. *Crozier* (1) the language of the will and the arrangement of the words were extremely like the language and arrangement of the clause before us. There the testator gave all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, *and after her death* to be equally divided to the children, *should there be any*. There were no children, and Lord Justice James, after many of the authorities to which we have been referred by Mr. Matheson had been discussed before him, held that the wife took an absolute interest in the residue. I do not think I am

(1) L. R. 15 Eq. 282.

doing violence to the very similar language of this will in construing it in the same way.

While the interpretation of the will, which I thus adopt, must govern my judgment, I can quite understand that a different mind might come to a different conclusion upon its extremely inartificial language. In my opinion, however, the judgment of the Vice-Chancellor must be reversed.

FITZ GIBBON, L.J. :—

In this case it is easy to find arguments in favour of either the respondents or the appellant, and therefore one gladly falls back upon the general principles of leaning against intestacy, and of not allowing a gift once conferred in clear language, to be cut down or divested except by language equally clear.

The testatrix first makes an absolute gift to Henrietta Margaret Monck of all her property with two small exceptions, both of which are gifts of *corpus*, and thus tend to show that the gift from which they are excepted is also a gift of *corpus* and not of a life interest. This clause forms a complete paragraph in the original will. Then comes a separate paragraph—a new and distinct clause :—"I would wish my money to be divided in equal shares after my sister Henrietta Margaret Monck's death between my sister Georgina and my niece Henrietta Cole should they survive her";—that is, "in a certain event, I would wish my money to be divided." This division is desired only in the event of the two named persons surviving Henrietta Margaret Monck. These words amount to a contingent executory gift over, and do not affect the previous gift unless the specified event happens. I assume, however, that if one of the two subsequent donees survived the first taker, she would be held entitled to one equal moiety.

I now compare this with three of the cases cited. In *Joslin* v. *Hammond* (1) the will was in these terms:—"I give to my wife (whom I appoint my executrix) the whole of my property . . . on condition of paying my mother £130 *per annum* during her (the mother's) life. At the death of my wife the whole of the

(1) 3 M. & K. 110.

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property to be equally divided among those of my children who may survive her." There are no words of contingency, and the only contingency which could happen was one not contemplated by the words used, namely, the death of all the children, an event apparently not contemplated by the testator, which, when it happened, caused a *lapse*. The will goes on:—"I do likewise desire that the whole of the property may be laid out legally in mortgages on land and may so remain. Should my wife marry again, each of my children on arriving at the age of twenty-four shall be paid £400. Should she not marry again I leave them implicitly to her kind and indulgent care." That will declares that the whole property was to be invested, and so to "remain." The wife got a life interest in the investments, reducible by the amounts payable to the children in the event of her marrying again, but she could not touch the *corpus*, and there was no disposition of the *corpus* except among children who did not survive to take it. In my opinion, therefore, Sir John Leach, M.R., had no alternative but to hold that there was an intestacy as to the property remaining invested at the wife's death, because the disposition had lapsed by the death of all the donees.

In *Constable* v. *Bull* (1) the will was in these terms:—"I give unto my wife Mary Ann Constable all my estate and effects for her sole separate use and benefit. I further give will and direct that at the decease of my wife whatsoever remains of my said estate and effects shall go to, and be equally divided, between the persons hereinafter named, or so many of them as may be then living." Again, there are no words of contingency, except as to how many of the after-takers might survive the wife, and the words as to separate use rather indicate a life interest. Some of the after-takers survived the wife, and therefore the gift over took effect. Either it was void, or the wife took a life interest only.

Sir J. L. Knight-Bruce, says:—"The gift to the wife is universal in the first instance, and then follow the ulterior gifts, with the words, 'whatsoever remains of.' The only question seems to be whether these three words have the effect of preventing the gift to the widow from being construed as a gift of a life interest:

(1) 3 De G. & Sm. 411.

for, without these words, the subsequent bequests would have the effect of so reducing the interest given to the widow. There are several meanings capable of being rationally attributed to these words, which would be inconsistent with the construction giving to the widow the power of disposing of the property; and as at present advised, I think that the other legatees have a substantial interest, and that such of them as survived the widow are entitled." He said that this must be considered to be his opinion unless he mentioned the case again, and he never did mention the case again except to say that he remained of the same opinion.

In *Crozier* v. *Crozier* (1) the testator gave some pecuniary legacies, and proceeded:—"All the residue of my effects, real and personal, whatsoever and wheresoever, I give to my wife, and after her death to be equally divided to the children, should there be any." I can see no distinction between the terms in which this testator spoke of the contingency of there being children to take after his wife's death, and the terms in which our testatrix speaks of the contingency of her sister Georgina, and her niece, Henrietta Cole, surviving her sister Henrietta. In both cases the language describing the quantity of the subject-matter of the gift exhausts all that the donor has to give. Lord Justice James, says:—"The testator gives the whole property directly to his wife without the interposition of trustees. It is a direct and absolute gift to her. Then he says, if there should be children, the property is to go to them after their mother's death. It is perfectly clear he did not mean to die intestate, but if the widow takes only a life estate, there is an intestacy. I am of opinion that the widow takes absolutely." The presumption against intestacy was strengthened there, as it is here, by the nature of the subject-matter of the gift. There it was a residue after legacies: here it is the whole property except certain specified portions. It appears to me that where the language of the will leaves the Court so far in the dark, as to the real intention of its maker, the presumption against intestacy applies. It is undesirable and even dangerous—as the Master of the Rolls has observed in *In re Bourke's Trusts* (2)—to weaken a general rule in doubtful

(1) L. R. 15 Eq. 282. (2) 27 L. R. Ir. 573.

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cases. I do not think that there is any general rule (such as Mr. Matheson contended for) that a gift in the first instance absolute is *always* cut down to a life estate by a subsequent gift of the same subject-matter to a different person introduced by the words, "after the death of" the first legatee. If there were such a rule, *Crozier* v. *Crozier* (1) would be a violation of it, and the other cases do not conflict with that decision.

HOLMES, L.J. :—

In considering the language of a will prepared without professional assistance, questions frequently arise which it is impossible for anyone to solve with confidence. The present is, I think, a case of this kind. At least, as far as I am concerned, the argument has left me in doubt; and although my inclination is to the same conclusion as that arrived at by the Vice-Chancellor, I express it with considerable diffidence.

The language of a portion of the will is far from clear, and in one sentence hardly intelligible. There is, however, no doubt that the testatrix in the widest terms gives all her property, except two small pecuniary legacies, to her sister Henrietta; but the difficulty arises in determining the extent of the interest thus conferred. Is it an estate confined to the life of the taker? This must be gathered from the language of the bequest taken as a whole; and I am not impressed with the argument founded on the apparent universality of the gift in the description of the property with which it begins. The important words are: "I would wish my money to be divided in equal shares after my sister Henrietta Monck's death between my sister Georgina Monck, and my niece Henrietta Cole, should they survive her." There is certainly no contingency in the early portion of this sentence which directs division after the death of Henrietta Monck. The contingency arises, if at all, from the final words, "should they survive her." These words taken by themselves would apparently convey that the gift is only to take effect if both survive. Admittedly, however, a division would be necessary if only one survived; and the obscure words that follow can only

(1) L. R. 15 Eq. 282.

be interpreted as meaning that in a certain event—the event that has actually taken place—there must be a division, even if neither survived. This, in my opinion, makes it difficult to hold that the early words which indicate a termination of Henrietta Monck's interest with her life are controlled by what follows.

It has been assumed by the appellant that the clause I have read is to be construed as a direction to divide the money after Henrietta Monck's death into two shares, one to go to Georgina Monck should she survive her sister, and the other to go to Henrietta Cole should she survive her aunt. Even if it were so expressed I should still be disposed to think that the contingency thus introduced did not relate to the cesser of Henrietta Monck's interest, but to the persons who would take the property on the termination of Henrietta Monck's life estate therein. I am, perhaps, unduly influenced by the idea which was, undoubtedly, prevalent when I was more familiar with questions of this kind than I am now, that where a gift of property to a person is followed by another disposition of it after such person's death, it is an excellent indication that only a life estate is given to the first taker. I think that too much stress in this case is laid upon the intestacy which might follow, and which in the events that have happened would follow the construction of the Vice-Chancellor. A Court leans against a construction that might lead to intestacy, because it assumes that a testator desires to make a complete disposition of his property. But here the testatrix probably thought that she had completely disposed of the property even if Henrietta Monck only took a life estate therein. She thought it likely that one of the second generation would outlive one of the first. Accordingly she provides that a niece should succeed to Georgina Monck's share whenever she might die; but she made no similar provision in the case of Henrietta Cole, who was herself a niece.

Crozier v *Crozier* (1) has been relied on; and although the language of the will is there clearer and simpler, it is undoubtedly not unlike the present case. But the judgment is very meagre; and no notice is taken in it of *Joslin* v. *Hammond* (2) which was

(1) L. R. 15 Eq. 282. (2) 3 M. & K. 110.

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referred to by counsel, and which seems to me to be inconsistent with the decision, for I cannot distinguish the two cases on the grounds that in the former the contingency of the second legatee's taking is not actually expressed, seeing that it is clearly implied in the language of the gift. On the whole, while hesitating to express dissent from the judgment of the Court in so doubtful a case, I feel bound to say that my opinion concurs with that of the Vice-Chancellor.

Solicitor for the appellants: *H. F. Martley.*
Solicitors for the respondents: *Maxwell, Weldon & Co.*
Solicitor for the trustees: *J. E. Mac Dermot.*

G. Y. D.

Appeal. 1899.

Dec. 20, 21.

IN RE DUGGAN'S ESTATE (1).

*Tithe rentcharge—Deduction of poor-rate from—*1 *&* 2 *Vict. c.* 56, *s.* 76—*Local Government Act,* 1898 (61 *&* 62 *Vict. c.* 37), *s.* 54.

The owner of tithe rent-charge is not entitled to claim payment without deduction of poor-rate.

ON the 1st November, 1899, the Irish Land Commission sent out receivable orders with respect to tithe rentcharge to the tithe payers by which the Land Commission claimed payment in full without making any deduction for poor-rate. One of these orders was sent to the receiver appointed by the Court over the lands in this matter, demanding payment of tithe rentcharge payable in respect of the benefice of Loughbracken in the county of Meath. He declined to pay, without any deduction for poor-rate, without the sanction of the Court. The Land Commission then applied to Ross, J., for an order that the receiver should pay to them the sum of £12 7*s.* 11*d.*, being the amount of the tithe

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

rent-charge without any deduction. On the 23rd November, 1899, Ross, J., refused the application, and the Land Commission appealed.

Ronan, Q.C., Campbell, Q.C., and *M'Carthy Mahony,* for the appellants :—

Poor-rate, as it existed before the passing of the Local Government Act, does not now exist. Down to the passing of that Act there were in the country two main taxes—poor-rate and county cess. The total of the poor-rate taken off agricultural land in the standard financial year was £633,461, and the total county cess was £821,849 : see Vanston on the Local Government Act, p. 457. These two are now collected together under the name of poor-rate in accordance with the provisions of the Local Government Act.

The poor-rate levied under 1 & 2 Vict. c. 56, was by section 61 of that Act to be applied solely for the relief of the destitute poor; the new rate under the Local Government Act is not a rate to be applied exclusively for that purpose, but it includes taxes which are to be applied for other purposes. When the Local Government Act was being passed the Legislature had to consider whether, for the purpose of collecting the new rate, it would adopt the machinery of the Poor Law Act or of the county cess, and they adopted the poor-rate system as applicable to the whole. The new rate imposed was called "poor-rate," and by sections 4, 5, 6, and 28, the power of levying and collecting poor-rate was transferred to the County Councils and Urban District Councils. The old poor-rate is gone, and there is nothing for section 76 of 1 & 2 Vict. c. 56, to operate on. It could not have been intended that the tithe-payers were to be entitled to deduct both poor-rate, as it existed before 1898, and county cess. Poor-rate under the Local Government Act is the one tax payable, and the expenses of the County Councils are to be paid out of the consolidated rate; it is essentially different from the old poor-rate.

It is impossible to segregate the poor-rate under the Local Government Act, so as to obtain any tax that will represent the old poor-rate. Union charges comprise a portion only of the old poor-rate; District charges comprise some of the components of the old poor-rate and certain other taxes, while County charges correspond in a general way with county cess.

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As between landlord and tenant, the tenant was entitled to deduct half the poor-rate under section 74 of 1 & 2 Vict. c. 56. That section is repealed. As to other Acts passed between 1838 and 1898, which added certain rates to the poor-rate, some of them entitled the deduction to be made, some were silent on the subject, and others prohibited the deduction. *Malton* v. *West* (1) decided that if the Act imposing the rate was silent on the subject, the tenant was entitled to deduct. By sect. 52 of the Local Government Act the occupier of a hereditament is not entitled to deduct from his rent any part of the poor-rate: why should tithe rent-charge be the sole exception?

Again, tithe rent-charge is rent within the meaning of sect. 74 of 1 & 2 Vict. c. 56: *Harris* v. *Darnley* (2); *Irish Land Commission* v. *Grant* (3). But sect. 72 of 1 & 2 Vict. c. 56, is among the clauses repealed by Sch. VI., Part 4, to the Local Government Act, and so sect. 76 of the Poor Law Act must be taken to be impliedly repealed

Matheson, Q.C., and *F. P. Hamilton*, for the receiver:—

We submit that tithe-payers are entitled to deduct the entire of the new poor-rate; and, if not, they are entitled to deduct such portion of it as will now represent the old poor-rate. Section 76 of 1 & 2 Vict. c. 56 has not been repealed by Schedule VI., Part 4, of the Local Government Act, though several other sections of the Poor Law Act in close proximity to sect. 76 have been repealed as stated in that schedule. That was not the result of an accident, but it was done deliberately, and section 76 must have some subject-matter upon which it can operate, as was decided by Ross, J., in *Mundy's Estate* (4), and that subject-matter must be the poor-rate under the Local Government Act. There is only the one poor-rate, and that is the rate struck under 1 & 2 Vict. c. 56; the power to levy it was first conferred by sect. 61 of that Act. The body to levy it is changed, and the jurisdiction to levy it is transferred to the County Councils and District Councils.

But between 1838 and 1898 a large number of rates and taxes were imposed by various statutes, which provided that the rates

(1) I. R. 11 C. L. 525.
(2) 30 L. R. Ir. 371.
(3) 10 A. C. 14.
(4) [1899] 1 I. R. 191.

which they imposed were to be collected in the same way as poor-rate. The Public Health Act, 37 & 38 Vict. c. 93, the Education Act, 55 & 56 Vict. c. 42, the Seed Supply Act, 43 Vict. c. 1, and the Labourers' Act, 46 & 47 Vict. c. 60, are the chief instances of this. Poor-rate had gone on increasing in volume from what it originally was, a rate for the relief of the destitute poor, until it attained the very large size it has by these additions. There was nothing left except county cess, and now the Local Government Act has added it to the number of those which are to be levied in the same way as poor-rate. It is, therefore, the last step in the system of levying and collecting local taxation that has been going on since 1838; the only operation of the Local Government Act is to enlarge the purposes for which poor-rate can be levied.

It would seem from some of the sections of the Local Government Act that it was contemplated that the old poor-rate and county cess could still for some purposes be segregated, *e. g.*, sect. 54, sub-sect. 11. But it is for the appellants to show that this can be done, otherwise we claim to be entitled to deduct the entire. Certainly Union charges do not correspond to the old poor-rate; their amount is smaller. There is to be a county fund for all the district charges, county at large charges, and union charges, and the county councils are to keep separate accounts; so that there is careful provision as to the uses for which the rate is to levied. We are entitled to make the deduction, and in the end it may make but a small difference, whether we deduct the amount of the old poor-rate, or the whole poor-rate under the new system, because in the latter event, in the case of agricultural lands, the agricultural grant comes in in reduction of what we should have to pay.

Dec. 21.

LORD ASHBOURNE, C.:—

We have had several opportunities of considering this case during the argument, and also during the adjournment, and although important, it is one turning on the construction of a few sections, which can be stated very shortly.

Before the Local Government Act was passed, tithe-payers were entitled under sect. 76 of the Poor Law Act (1 & 2 Vict.

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c. 56) to deduct the entire of the poor-rate from every £1 they paid as tithe. That section of the Poor Law Act is not repealed by the Local Government Act, although several other sections of the former Act in close proximity to it have been repealed. It is, therefore, obvious that some effect is still to be given to this 76th section, unless there is some impossibility in doing so, or unless there is no subject-matter upon which it can operate. Mr. Ronan's argument was that sect. 76 of the Poor Law Act was practically gone; that whether it was repealed in terms or not, it should be treated as out of the Act, because there was no subject-matter, upon which it could operate. That is a grave conclusion to be asked to arrive at, and one only to be justified by necessity and clear proof.

Ross, J., in the month of December, 1898, pronounced judgment in the case of *Mundy's Estate* (1) in which he decided that as the 76th section had not been repealed, he had to give effect to it, and allow the deduction given by that section. Ross, J., stated that he would frame his order so as to give every opportunity for appealing. It is to be regretted that some method was not adopted of bringing that decision to the test of speedy examination in this Court, on a matter of such importance, if the law as laid down by the learned Judge was not to be accepted as correct. But Mr. Ronan said that it was not thought that any suitable opportunity presented itself of bringing the case to this Court until recently, when the tithe rent-charge became due. So the question has now been brought on by the Land Commission, who moved a motion before Ross, J., for an order that the receiver in this matter should forthwith pay to the Land Commission the sum of £12 7*s.* 11*d.*, being the amount of the tithe rent-charge, less income tax, due to them out of this estate up to the 1st November, 1899, without making any deduction therefrom for poor-rate. Ross, J., refused the application, and that is the order, and the sole order, under review here.

Speaking for myself, I decline to go outside the order under review, and I decide solely the question whether that order is well founded or not. Mr. Ronan and Mr. Campbell have argued

(1) [1899] 1 I. R. 191.

that as the poor-rate under the Local Government Act comprises certain items of large amount, such as county cess, not included in the old poor-rate, and having regard to the history of poor-rate, and the several statutes relating to it, it cannot now be a subject-matter upon which sect. 76 of the Poor Law Act can be held to operate, and that notwithstanding the fact that sect. 76 has been left unrepealed, and there is still poor-rate, that section has now no effect. But obviously it is difficult to treat sect. 76 of the Poor Law Act as non-existing, when it is there still on the face of the Act of Parliament, if any construction can be given to the section as applying to an existing subject-matter. Under those circumstances, Ross, J., came to the conclusion that, there still being poor-rate, the tithe-payer was entitled under that section to make the deduction thereby provided, and he refused to accede to the contention of the Land Commission that there should not be any deduction for poor-rate.

The learned counsel for the tithe-payer first argued that he was entitled, under this 76th section, to deduct from the rent-charge the whole of what is now known as poor-rate, that that was his right under the section, that the right (if it existed) was not affected by the circumstance that under the Local Government Act, it was made larger than before; and that enlargements had taken place under prior legislation, without its being suggested that they affected the tithe-payers' right of deduction under sect. 76. On the other hand, counsel for the Land Commission contended that though still called poor-rate it had by its new inclusions practically become a new subject-matter. Mr. Ronan in substance argued that the poor-rate was now so enlarged, and with such new elements, it was unreasonable to hold that it could any longer be deducted. He drew our attention to several statutes passed since 1 & 2 Vict. c. 56, authorising the levy as part of the poor-rate of money to be applied for different public purposes. Some of these statutes gave the occupier expressly the same right of deduction as was given by 1 & 2 Vict. c. 56, whilst others as clearly said that no such deduction should be made. But I am not aware that he cited any Statute that sought to impair the right of tithe-payers under sect. 76 so often referred to. Mr. Matheson also urged as an additional and alternative argument, that if they

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could not deduct the whole, they were entitled to make, at all events, the deductions, which the tithe-payer could make before the passing of the Local Government Act. Mr. Ronan did not apply himself to the last topic, because it interfered with his main contention; but he did not, I think, suggest that the Land Commission, or any parties interested, were excluded from considering the point, if they found that they could do so. But we have no materials in the papers before us to enable the Court to make any discrimination, or to enter into, or discuss, or decide the point. We can only deal on this appeal with the facts before us. Ross, J., was asked by the Land Commission to decide that the tithe rent-charge should be paid without any deduction for poor-rate. This he entirely refused to do, and I do not see my way to interfere with his order; but I reserve my opinion as to what should be the amount of the deduction. A serious argument was addressed to us, that the old poor-rate, or any equivalent, cannot be discriminated in the new poor-rate under the Local Government Act from the other taxes and charges. This of course may be so, but it may also be that some division or discrimination will be found to be possible, in which case I have no doubt it will be strongly urged that the deduction should have regard to the amount and elements of the poor-rate before the passing of the Local Government Act. We are not in a position to decide if this can done. For the reasons I have indicated, in my opinion the order of Ross, J., should be affirmed, and the appeal dismissed with costs.

FitzGibbon, L.J.:—

I wish to specify distinctly what we are deciding, and what we are not. The sole question which we decide is, that the Land Commission is not entitled to recover from the Receiver the sum of £12 7*s.* 11*d.*, without making any allowance for poor-rate. The Land Commission took it on itself to issue a Receivable Order for payment of the full sum—no less could be paid, or received by the bank, under that Order—and by that Order the Commission must stand or fall on this appeal. This "neck-or-nothing" course was taken, although the Land Judge had decided that the full deduc-

tion for poor-rate was to be made, and although the Land Commission might have sued for the full amount of the tithe rent-charge by civil bill, leaving the tithe-payer to defend for any deduction he might claim, paying or tendering the balance; and the question whether any, and if so what, deduction could be made, might then have been brought to this Court for decision, on a case stated.

When sect. 74 of the Poor Law Act was wholly repealed, and sects. 75, 78, 79, and 80, were partially repealed, while sect. 76 was not repealed, we must give effect to it, if there is any subject-matter upon which it can operate. Leaving it thus unrepealed is tantamount to a clear implication that it has some subject-matter. The first argument for the Land Commission went the whole length of saying that there is now no "poor-rate under the Act of 1838" in Ireland at all. The untenable character of that position has been demonstrated by Mr. Matheson; for he has showed that all the powers of making, collecting, levying, and receiving "poor-rate," for the purposes of the Act of 1898, are still to be found in the Act of 1838.

The extraordinary argument was next put forward by Mr. Ronan to-day, for the first time, that tithe rentcharge was "rent" within sect. 74, and therefore that the repeal of sect. 74 had in effect repealed sect. 76 also, although that section had been left unrepealed. If this argument were well founded, sect. 76 never had any effect, and its original enactment was nugatory and a blunder. I must hold that there originally was, and that there still is, a subject-matter to which sect. 76 applies; and I decline to attribute to the Legislature the idea either of repealing that section by implication, or of leaving it without any subject-matter, and it must follow that the "rate made" therein referred to—whatever that rate is—may be still deducted under it.

If necessary, that subject-matter may be found in the whole "poor rate" levied under the Local Government Act. Mr. Ronan actually contended that the whole of the new poor-rate or nothing must be deductible. I hesitate to adopt that view, unless I am driven to do so; but if no means of dividing the

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new rate can be found, it is the necessary result of our decision that the whole of the new "poor-rate" under the Act of 1898 will be deductible. There are at least three modes of dividing the new poor-rate which are possible, and we have no means of ascertaining whether any one or more of them can be made effective. The question has not been argued; we have been given no assistance towards determining it, and in going for the whole £12 7*s.* 11*d.*, the Land Commission has not left the question open on this appeal.

First, it may, perhaps, be said that on the construction of the Act of 1898, read with the Act of 1838, a portion of the new "poor-rate" may be found still to represent the "rate made" under the Act of 1838, and that such portion only is deductible. I find, both in the Act of 1898 and in the notices for payment of the new rate, that Union charges, District charges, and County charges are distinguished. Union charges seem to comprise nothing which was not included in the old poor-rate of 1838, but they do not include the whole of it. District charges comprise some of the components of the original poor-rate; they also comprise some of the charges which were added to the poor-rate since 1838, and as to some of these, such as the seed-rate, I believe that there are prohibitions against deduction, which are still unrepealed. County charges seem to consist entirely of expenses, not Union or District charges, which were not hitherto included in "poor-rate," or capable of deduction as such. But the question of segregation on the face of the Act has not been argued; no one has endeavoured to supply the materials for working it out, and, in his attempt to avoid all deduction, Mr. Ronan has contended that division is impossible.

The second possible mode of division is under an Order in Council. There is nothing more peculiar—or to the constitutional lawyer more extraordinary—in the Local Government Act, than the *quasi* legislative powers which it confers on the Lord Lieutenant in Council. No Privy Council Order has been brought before us, and we cannot now consider whether such an order has made, or might make, some division of the new "poor-rate" which would enable the old poor-rate, or some modification of it,

to be recognized as being still made under the Act of 1838 for the purpose of deduction under sect. 76.

The only other way out of the difficulty is by legislation, as to which I say nothing, save that this Gordian remedy is not in our hands.

When we are pressed by the apparent injustice of allowing the tithe-payer to deduct as "poor-rate" what is not "poor-rate" in the original sense, and what he could not deduct before, we cannot forget that this peculiar power of deduction was a benefit conferred by the Legislature on the tithe-payer, which was, from the first, not limited to what he had paid: the tithe-payer could deduct the entire of the poor-rate from the tithe rentcharge, though, in the case of rents payable to him, the tenants could not deduct more than half, and, while "contracting out" was lawful, might not be able to deduct anything. It was really a poundage deduction from tithe rentcharge in favour of the rate-payer and against the tithe-owner, and whether it was founded on the idea of compensating the tithe-payer for being made a tithe collector against his will or not, we cannot speculate. Subsequent legislation, when it added other assessments to the poor-rate, made some of them leviable and deductible as poor-rate, and prohibited the deduction of others, at least between landlord and tenant. How many of these accretions to the old poor-rate were, or ought now to be, laid on the tithe-owner, we cannot now decide. We have been left no choice on this appeal, except to say "Yes" or "No" to the demand for payment in full of the whole tithe rentcharge without any deduction at all.

In my judgment this Receivable Order of the Land Commission cannot be enforced; and I think it is lamentable that the Land Commission should have issued these demands for money which the Land Judge had decided not to be payable, having regard to the fact that a vast number of the tithe-payers would probably be ignorant of their rights, or would not find it worth their while to dispute demands for small sums, made by a public authority. On a civil bill, with the facilities now afforded by a case stated for coming to this Court, there were, and are, ample and easy means of obtaining a decision, not only on the power of deduction, but on the amount to be deducted.

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This appeal must be dismissed with costs. The Land Commission, in reply to the receiver's letter calling attention to the decision of the Land Judge, elected to treat that decision as mere "observations" which it was advised to disregard, and the dismissal of this appeal is the just and necessary consequence of that course.

WALKER, L.J.:—

I concur. Section 76 of the Poor Law Act has not been repealed by the Local Government Act, and, on the contrary, I think it has been left unrepealed deliberately. It is clear therefore on the face of the statute that some right of deduction was intended to be reserved for the tithe-payer. We cannot listen to the argument that leaving sect. 76 unrepealed was a mistake. The schedule to the Local Government Act repeals other sections of the Poor Law Act in close proximity to sect. 76, while it leaves this latter section unrepealed. Further, I see no reason why the tithe-payer should have been deprived of his former right of deduction.

The Land Commission have come here to argue that there should be no deduction from the tithe rent-charge at all. That was their application in the Court below, and, in our judgment, the tithe-payer is entitled to make a deduction. The question remains, what is the amount of the deduction? It may be that, if there is no means of ascertaining what now represents the poor-rate under the old system, the whole amount of Union charges, District charges, and County at large charges—in other words, what is now called "poor-rate"—should be deducted. But, on the other hand, it may well be that the integral part of the new rate, which represents the poor-rate which could be deducted when the Local Government Act passed is capable of being ascertained. The Act itself furnishes ground for this. It says the guardians are to furnish to the new body the particulars of their expenses, and the legislation as to Urban districts points in the same direction.

It is curious, when we come to examine the 51st section, that what is called poor-rate in sub-section 5 is called the County fund in sub-section 1, and the words of sub-section 5 are peculiar, "shall

raise" by means of the poor-rate, as if the mode and authority of levying were what was in contemplation.

It is said that there is nothing for section 76 to operate upon, but that is the question. The amount under section 76 may still be severable and ascertainable. It may be arrived at by reference to the statute itself, or if necessary, with the aid of a Privy Council Order.

It is not necessary to express any definite opinion on the point. The present appeal motion must, I think, be refused with costs.

HOLMES, L. J. :—

The assessment, known in Ireland as poor-rate for upwards of sixty years, originated in a statute passed in the first year of the Queen, 1 & 2 Vict. c. 56. By its 61st section the Boards of Guardians, called into existence by the Act, were empowered to levy rates on the occupiers of rateable hereditaments; and by the 52nd section they were prohibited from applying any of the money raised by them to any purpose not expressly provided by the Act. The 74th section authorises every occupier to deduct from the rent to which he is liable a proportion of the poor-rate paid by him, and the word "rent" in this section includes a rentcharge. The 76th section authorises every person liable to pay tithes, to deduct from every pound in value of such tithe the entire poundage of poor-rate made under the Act upon the hereditaments out of which such tithe arises. When this statute became law, tithe rent-charge was unknown; but in the same session of Parliament, by the Act 1 & 2 Vict. c. 109, an impost by this name took the place of tithe and tithe composition; and by the 26th section it was provided that the rent-charge thus created should be taken to be tithes within the meaning of the Poor Law Act, the result of which was that the payers of the tithe rent-charge became entitled on paying the same, to deduct therefrom a poundage calculated in the manner provided by the 76th section already quoted. Between the years 1838 and 1898 many statutes were passed authorising the guardians to levy as part of, or as an addition to, the poor-rate money to be applied for various specified purposes; and these statutes must be regarded as amending the 52nd section of the

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Poor Law Act which, as I have already pointed out, prohibited the guardians from applying any money raised under the authority of that statute to any purpose not expressly provided thereby. Some of these Acts in express terms gave the occupiers the same right of deduction as that contained in the 74th section; some were silent on the subject; and one at least, the Seed Supply (Ireland) Act, 1880, enacts that no such deduction shall be made in respect of the addition to the poor-rate thereby authorised. Our attention, however, has not been directed to a provision in any of these Acts referring to the right conferred on the tithe-payers by the 76th section; and I believe that there is no such provision. The result of such silence, in my opinion, was that the payer of the tithe rent-charge had the same right of deduction in respect of these accretions to the poor-rate which was given to him by the 76th section in the case of the original rate. This was the view which seems to have been taken in *Malton* v. *West* (1) in construing the Public Health (Ireland) Act, 1874, which was silent on the subject of deductions. That case related to a claim by the occupier to deduct from his rent; and the express declaration regarding this class of deduction introduced into the Public Health (Ireland) Act, 1878, was only declaratory of the law previously settled. In this state of things the Local Government (Ireland) Act, 1898, was passed; and by its 6th section the business of the guardians with respect to making, levying, collecting, and recovering the poor-rate in so much of the county as is not comprised in an Urban county district is transferred to the council of each county. The rate to be made by virtue of this transferred power is called throughout the Act the poor-rate, and the moneys raised by it are to be applied for all the purposes for which the poor-rate was previously applicable, and also for purposes theretofore served by other assessments, such, for example, as the county cess. There was thus done on a very large scale what, to a smaller extent, was effected by the several statutes following the Poor Law Act, to which I have already referred, that is to say, there was an extension of the purposes to which the poor-rate was to be applied; and if there were nothing

(1) I. R., 11 C. L., 325.

more in the Act of 1898, I should be disposed to think that the old right of deduction continued in the case of the enlarged rate. There is, however, more. It is enacted in the 52nd section that, subject to certain exceptions, the occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor-rate, and, consequently, the 74th section of the Poor Law Act is included amongst the repealed enactments. Moreover, elaborate provisions are made with the view of compensating the occupier for the right of deduction of which he is thus deprived. But there is no legislation of a corresponding kind relating to the right to deduct from tithe rent-charge. The 52nd section does not apply to the tithe-payer; the 76th section of the former Act is not repealed; and he receives no compensation. From all this it would seem to me to clearly follow that the payer of tithe rent-charge would be entitled to deduct therefrom a poundage calculated on the basis of the full amount of the poor-rate in its new shape, unless it can be shown that it is composed of severable elements. There is no doubt that the term "poor-rate" is applied in the Act to two different things; the poor-rate as it previously existed, and the poor-rate as it was to be subsequently. I am especially struck with sect. 54, sub-sect. 11, by which in an Urban district an occupier under a specified kind of tenancy is given a right to deduct from his rent "such portion of the amount of poor-rate actually paid by him, from time to time, as he would have been entitled to deduct if this Act had not passed, or if he was entitled before the passing of this Act to deduct all the poor-rate and county cess, then the whole of the poor-rate so actually paid." There are serious difficulties, not only in construing, but in carrying out, this section; and it only applies to Urban districts. Still there seems to underlie it the idea that the poor-rate as it now exists is severable; and if it could be shown that the legislature contemplated that the old poor-rate was to continue to exist as a separate entity, and supplied machinery for ascertaining its amount, I might hold that the deduction to be made from tithe rent-charge was limited to it. For this reason I gladly join with the other members of the Court in leaving this question open. It is not necessary to decide it now, and it may be presented in a different point of view on another occasion. I do so,

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however, in the interest of the tithe-owner, for I am bound to say that up to the present I see no sufficient reason for limiting the deduction. Being clearly of opinion that there must be some deduction, I hold that the order appealed from must be affirmed; but I agree that beyond this we ought not now to go.

Solicitor for the Land Commission: *W. Alexander.*
Solicitor for the receiver: *H. F. Martley.*

R. D. M.

Ross, J. 1899. Nov. 7.

In the MATTER of the ESTATE of STEPHEN TYSON, Trustee in Bankruptcy of ALEXANDER HAMILTON SYNGE, a Bankrupt, Owner; Ex parte ELIZA DAVIS, Petitioner.

Land Judge's Court—Practice—Service out of the jurisdiction of notice to lodge deeds.

The service out of the jurisdiction of an order to lodge deeds is invalid, and an order for attachment founded thereon cannot be made in the event of disobedience.

Application on behalf of Alexander Hamilton Synge, for an order that the order in this matter, dated the 28th July, 1899, for the attachment of the said Alexander Hamilton Synge, be set aside on the grounds—1, that the order in the matter, bearing date the 27th March, 1899, was irregularly served upon the said Alexander Hamilton Synge, and that the service thereof was bad; 2, that the said order was served out of the jurisdiction; and 3, that the said order did not describe the nature of the documents sought to be lodged in Court, nor the property to which such deeds and documents related.

The facts were as follows:—The estate for sale was the reversionary life estate of the owner, expectant on the life estate of Miss Edith Jane Gardiner. The affidavit of Ellis J. Davis, son of the petitioner, stated circumstances from which it appeared that the deeds had been removed by the owner. The following order was made by the Registrar, on the 27th

March, 1899:—"Upon motion of Mr. John D. Rosenthal, solicitor for the petitioner, and on reading the affidavit of Ellis J. Davis, filed the 18th March, 1899, it is ordered by the Court that the said Alexander Hamilton Synge do lodge in Court, on oath, all deeds and documents relating to the premises for sale herein, that now are, or at any time were, in his custody, power, or procurement (or account for the same on oath) within ten days after the service of this order on the said Alexander Hamilton Synge.

"J. M. KENNEDY, Registrar."

This order was served on the owner on the 24th April, at 37, Walbrook, London, and the service was proved by affidavit. On the 9th June, 1899, a notice of motion for attachment of the owner for contempt in not obeying the order of the 27th March was served. After several adjournments the motion for attachment was granted on the 30th June.

Matheson, Q.C. (with him *G. F. Brunskill*), for the owner:—

1. When the copy order for the lodgment of deeds was served, the original was not shown to the owner; 2, there was no jurisdiction to serve the order; it was not made by the Judge, and even if it had been, there was no power to serve it out of the jurisdiction. Service out of the jurisdiction is the creation of statute, and regulated by the Judicature Act. See Order XI., Rule 1, and the notes thereon in the *Annual Practice* for 1900. It is only allowed in two classes of cases—1, where the process is a writ of summons, or notice of a writ of summons; and 2, where it is brought within it by reference. The Irish Order is in the same words. There is no such power given by the Landed Estates Court Act. Rule 20, of the Rules of 1859, regulates the lodgment of deeds, and Rule 55 of the same does not apply. When the notice of motion for attachment came on for hearing the owner was in Roumania, and his solicitor's appearance to ask for an adjournment would not give jurisdiction when the owner's liberty was at stake: *Taylor* v. *Roe* (1), *Evans* v. *Noton* (2),

(1) 68 L. T. (N. S.) 213. (2) 9 Times R. 108.

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Mander v. *Falcke* (1). The Rules for lodging deeds are in a general form, and similar Rules are framed under the Probate Act of 1857, and there is no power to serve subpœnas to lodge wills out of the jurisdiction: *In re Mary Dowling* (2), *In the Goods of Ambrose* (3). Even if there were jurisdiction, it should be exercised by a separate special order.

O'Connor, Q.C. (with him *Rosenthal*), for the party having carriage:—

The owner has no merits. The practice is to serve these orders out of the jurisdiction, on the ground that there cannot be a conflict of jurisdiction. But there is a great doubt if an order of this kind can be served out of the jurisdiction. An alternative course can, however, be adopted. The Court has power to order substitution of service on an agent in this country, and substituted service could be made on the owner's solicitor, and a writ of attachment could issue thereon in case it was disobeyed.

Ross, J.:—

It is plain that Mr. Matheson's point is a good one. The service of the order upon Mr. Alexander Hamilton Synge to lodge the deeds was a bad service, and consequently the order for attachment ought not to have been made. At the same time it is clear that Mr. Synge is deliberately obstructing the proceedings in this Court. I shall, therefore, give him no costs. Let the order for attachment be rescinded, without costs.

Solicitors for the owner: *Collis & Ward.*
Solicitor having carriage: *John D. Rosenthal.*

W. C. S.

(1) [1891] 3 Ch. 488. (2) 3 L. R. Ir. 184. (2) [1894] 1 I. R. 310.

USBORNE *v.* THE LIMERICK MARKET TRUSTEES. (No. 2.)

(1898. No. 274.)

M. R.
1899.
May 18.
June 1, 6, 10.

Appeal.
Oct. 31.
Nov. 1, 20.
Dec. 21.

Mortgage—Priority—Mortgage of tolls—Interest of prior and puisne mortgages made a first charge by local Act—Interest of puisne mortgage taking priority over principal sum secured by earlier mortgage—Limerick Market Acts, 1852, 1862, 1872 (15 *Vict. c. civ.*, 25 *Vict. c. xxiii.*, 35 & 36 *Vict. c. xcvi.*)—*Merger—Rate of interest—Judgment—Covenant.*

As an ordinary rule, when lands are pledged to secure a debt as a first charge, the owner of the mortgage is entitled to principal and interest out of the security as against the mortgagor and his assigns, and in priority to any claim by him or them. But where, by successive local Acts of Parliament, passed in the years 1852 and 1862, power to borrow money was given to trustees of a market upon the security of the tolls, and it was provided by the later Act that "the interest on the said sum of £30,000, authorized to be borrowed under the Act of 1852, and the interest on the sum of £10,000, authorized to be borrowed under this Act shall be a first charge on the tolls," it was held by the Court of Appeal, affirming the Master of the Rolls, that the interest secured by the puisne mortgages effected under the later Act took priority over the principal secured by the prior mortgages effected under the earlier Act.

A mortgage deed contained a covenant by the mortgagors for payment of the principal sum on a day named, with interest in the meantime at £5 per cent. per annum, and also, if the principal sum should not be then paid, that so long as the same, or any part thereof, should remain unpaid, the mortgagors would pay interest half-yearly at the same rate for the said principal sum, or so much thereof as should, from time to time thereafter, remain unpaid. The mortgagors having made default the mortgagees recovered judgment against them for principal and interest on the covenant:—

Held, by the Court of Appeal (affirming the decision of the Master of the Rolls), that the covenant merged in the judgment, and that the mortgagees were, therefore, entitled only to £4 per cent. interest on the judgment debt, and not to £5 per cent. interest on the principal sum under the covenant.

Popple v. *Sylvester* (22 Ch. D. 98), *Ex parte Fewings* (25 Ch. D. 338), and *Lowry* v. *Williams* ([1895] 1 I. R. 274), discussed and applied.

Query: Whether, when a judgment is obtained for an amount of principal and arrears of interest, upon which interest at 4 per cent. would be more than the amount of the interest on the original principal debt at the contract rate, any excess can be recovered out of the security.

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USBORNE v. LIMERICK MARKET TRUSTEES. (No. 2.)

MOTION on behalf of the defendants, the Economic Life Assurance Society, for an order that the defendant, John Hardiman, the receiver in this action, should be directed to apply the income from time to time arising from the rents, tolls, rates, and customs of the Limerick Markets, after payment thereout of the costs in the judgment in this action, dated the 27th July, 1898, mentioned, in discharge of the interest due and to accrue due on the £30,000 mortgage authorized by the Act of 1852, and given to the said Economic Life Assurance Society, and that after payment of the said interest the surplus income arising from the said rents, tolls, rates, and customs shall be applied by him from time to time in reduction of the said principal sum of £30,000 in priority to, and before any payment be made to, the puisne mortgagees of the said Limerick Markets under the Act of 1862 in the pleadings mentioned, and that if necessary the said judgment dated the 27th July, 1898, should be amended accordingly.

On this motion coming on for hearing, liberty was given by the Court to the National Bank (who held a mortgage puisne to that of the Economic Life Assurance Society), without serving notice, to object to the certificate of the Chief Clerk, filed the 6th May, 1899, so far as it allowed interest at the rate of £5 per cent. per annum on the claim of the Economic Life Assurance Society from the 12th April, 1897, being the date of their judgment, recovered on the covenant in their said mortgage, in an action in the Queen's Bench Division.

The motion and the objection were then heard together.

The pleadings in the action have already been fully stated [1899] 1 I. R. pp. 230-234. By the judgment of the Court given upon the admission of facts by the defendants and upon the pleadings, it was ordered that the following accounts should be taken:—(*a*) an account of the tolls, etc., which had arisen since the 1st May, 1897, and by whom received, and how applied; (*b*) an account of all sums received by the Economic Life Assurance Society, on account of such tolls since the 9th September, 1897; (*c*) an account of what was due to the plaintiff, and his co-mortgagee respectively: and it was ordered (1) that the respective priorities of the said several mortgages should be ascertained and declared: (2) that the Economic Life Assurance Society should

account for the moneys received by them on account of tolls, etc., out of their due priority; (3) that the income arising from the tolls, etc., should be applied in discharge of the interest, costs, and principal moneys due to the said respective mortgagees, according to their proper and respective priorities; (4) that the defendant John Hardiman, the receiver appointed in this action by an order dated the 14th June last do out of such tolls, etc., as may from time to time come to his hands applicable thereto, pay the interest on the several debentures in such priority and at such rate as may be so ascertained. The judgment then declared the plaintiff and the receiver entitled to their respective costs both of this action and of the action in the Queen's Bench Division, and directed the receiver to pay the said costs, and have credit for the same in passing his accounts.

The Chief Clerk took the several accounts so directed, and by his certificate filed the 6th day of May, 1899, certified the several amounts due thereon respectively. By the same certificate he found that the mortgages issued under the Limerick Markets Act, 1852, set out in the first part of the schedule thereto, were in equal priority, and took priority over the mortgages issued under the Limerick Markets Act of 1862, set out in the second part of the said schedule, which among themselves were in equal priority. The said accounts were taken, and the certificate framed upon the principle that the Economic Life Assurance Society were entitled to interest at the rate of £5 per cent. on the principal sum secured by their mortgage under the covenant therein, notwithstanding the judgment recovered by them in the Queen's Bench Division, on April 12, 1898, for £19,443 7*s.* 9*d.* for principal and interest, with interest thereon at £4 per cent. per annum.

The question of priority raised by the notice of motion and of the proper rate of interest raised by the objection to the Chief Clerk's certificate arose on the construction of the following sections of the Limerick Market Acts, 1852, 1862, and 1872, and on the frame of the mortgages granted thereunder by the trustees.

The following are the material sections of the Limerick Market Act, 1852 (15 Vict. c. civ.) :—

SECT. 24.—"It shall be lawful for the trustees to borrow, at any rate of interest not exceeding five pounds for the hundred pounds by the year, on

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mortgage of the lands, works, rents, and tolls, hereby authorized to be purchased, hired, appropriated or taken, or of any property which may be vested in the said trustees by virtue of this Act, any sum or sums of money not exceeding in the whole the sum of thirty thousand pounds, for the purposes of this Act, and from time to time to pay off and re-borrow the same, or any part thereof, but so that there shall not be due at any one time under the present power more than the said principal sum of thirty thousand pounds."

SECT. 25.—"Every mortgage authorized to be made under the provisions of this Act shall be by deed under the common seal of the said trustees, duly stamped, and in which the consideration shall be truly stated, and may be respectively according to the forms in Schedule A, to this Act annexed, or according to the form in Schedule B, to 'the Commissioners Clauses Act, 1847,' annexed, or to the like effect respectively."

SECT. 26.—"It shall be lawful for such mortgagees to enforce the payment of the arrears of principal and interest due on any such mortgages by the appointment of a receiver; and in order to authorize the appointment of such receiver in the event of the principal moneys not being duly paid, the amount owing to the mortgagee by whom application for such receiver shall be made shall not be less in the whole than five hundred pounds."

SECT. 27—"Any person entitled to any such mortgage may transfer his right and interest therein to any other person; and every such transfer shall be by deed, duly stamped, wherein the consideration shall be truly stated, and may be according to the forms respectively in the Schedule B, to this Act annexed, or according to the form in the Schedule C, to 'the Commissioners Clauses Act, 1847,' annexed, or to the like effect respectively."

SECT. 52.—"That all moneys arising from the rents and tolls to be levied and taken as aforesaid, and all moneys which shall be borrowed on mortgage as aforesaid, and all moneys which shall come to the hands of the trustees, otherwise howsoever under this Act, shall be applied and disposed of as follows:—first, in defraying the charges and expenses of the Town Council, the Grand Jury, and the Chamber of Commerce respectively, preparatory and incident to the passing of this Act; secondly, in paying the interest of the moneys to be borrowed as aforesaid; thirdly, in paying to the Council one-third of the gross income of the trustees, such one-third to be computed after providing out of the said gross income for the interest of all sums of money to be raised for the purposes of this Act; and after the principal moneys to be borrowed as aforesaid shall have been paid, then such one-third to be computed after deducting one thousand pounds per annum from the gross receipts for the purposes of this Act; fourthly, in paying the salaries and expenses of the officers appointed for carrying this Act into execution, and making, providing, regulating, and maintaining the market and market-places hereby authorized, and carrying all the purposes of this Act into execution; and, fifthly, in paying off the principal of the moneys so borrowed as aforesaid: and the residue (if any) in the hands of the trustees, after the purposes aforesaid shall have been effected, shall be paid

and applied for such public purposes within the limits of this Act as the said trustees may think fit."

The material portions of the schedules were as follows:—

SCHEDULE A.

Form of Mortgage.

Mortgage, No.

By virtue of the "Limerick Market Act, 1852," we, the Limerick Market Trustees, in consideration of the sum of paid by *A. B.*, of , for the purposes of the said Act, do grant and assign unto the said *A. B.*, his executors, administrators, and assigns, the said undertaking, and the rents, tolls, and other moneys, arising by virtue of the said Act, and all our estate, right, title, and interest in the same, to hold unto the said *A. B.*, his executors, administrators, and assigns, until the said sum, pounds, together with interest for the same, at the rate of for every one hundred pounds by the year be satisfied. [The principal sum to be repaid at the end of years from the date hereof.]

Given under our Common Seal, this day of , in the year of our Lord, 185

SCHEDULE B.

Form of transfer of Mortgage by endorsement.

I, *A. B.*, of , in consideration of the sum of , paid to me by *C. D.*, of , do hereby transfer to the said *C. D.*, his executors, administrators, and assigns, the within security and all my right and interest therein.

In witness whereof I have hereunto set my hand and seal, this day of , 18

Form of transfer of Mortgage by a separate deed.

I, *A. B.*, of , in consideration of the sum of , paid to me by *C. D.*, of , do hereby transfer to the said *C. D.*, his executors, administrators, and assigns, a certain mortgage, No. , made by the Limerick Market Trustees, by virtue of the "Limerick Market Act, 1852," to , bearing date the day of , 185 , for securing the sum of , and interest, and all my right and interest therein.

In witness whereof I have hereunto set my hand and seal, this day of , 185

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Under the powers conferred by this Act, the trustees borrowed from the National Bank two several sums of £10,000, one of the said sums bearing interest at £4½ per cent., the other bearing interest at £5 per cent., and secured by two several deeds in the statutory form dated, respectively, the 22nd September, 1853, and the 3rd May, 1854, the said principal sums being payable at the expiration of twelve and eighteen calendar months, respectively, from the dates of the said mortgages.

In the year, 1858, the National Bank required repayment of these loans, and the trustees applied to the Economic Life Assurance Society to advance the sum of £20,000 for that purpose, which they agreed to do upon the security of transfers of the two existing mortgages for £10,000, and the further security of the deed of mortgage, dated the 17th November, 1858, mentioned in the statement of claim. The transfers of the existing mortgages were in the simplest form, and nothing turns upon their terms. The deed of further security, however, must be stated at some length.

This deed, dated the 17th November, 1858, and made between the Limerick Market trustees of the one part, and trustees of the Economic Life Assurance Society of the other part, recited the provisions of the Act of 1852; that the Market trustees had put the said Act into execution; that they had borrowed on the security of the two mortgages of the 22nd September, 1853, and May 3, 1854, the two sums of £10,000 with interest at the respective rates aforesaid; that they had borrowed further sums not exceeding, in the whole, £30,000; that the said two principal sums of £10,000 were then due, but that all interest thereon had been paid; that the Market trustees having been requested to repay the same principal sums had applied to the trustees for the Economic Life Assurance Society to advance the sum of £20,000 for that purpose, which they had agreed to do, upon having such mortgage debts and securities transferred to them, and upon having the repayment of the same sum, with interest thereon, further secured to them in manner thereinafter mentioned: that a formal resolution had been passed by the Market trustees authorising the transfer of the two mortgages and the granting of the further security given by the present deed; and that the two

mortgages for £10,000 had accordingly been transferred. After these recitals the Market trustees, in consideration of the sum of £20,000 having been so paid, granted and assigned to the trustees for "the Economic" their heirs, executors, administrators and assigns, the market, lands, buildings, rents, and tolls to hold the same unto and to the use of the trustees for the "Economic," their heirs, executors, administrators, and assigns, subject to the proviso for redemption thereinafter contained. The proviso for redemption was in these terms:—"Provided always, and it is hereby agreed and declared, that if the Limerick Market trustees, their successors or assigns shall pay to the said [trustees of the Economic Life Assurance Society] the sum of £20,000, with interest for the same after the rate, at the time and in manner hereinafter covenanted and agreed for the payment thereof, together with all expenses relating thereto, then, and in such case and at any time after such payment shall be so made, the said [trustees of the Economic Life Assurance Society] shall, at the request and expense of the Limerick Market trustees, their successors or assigns, assure, and release the said buildings, lands, markets, tolls, rents, hereditaments, and premises, with the appurtenances expressed to be hereby assured (hereinafter called the mortgaged hereditaments and premises) unto and to the use of the Limerick Market trustees, their successors and assigns, or as they shall direct." The deed next provided that the mortgagors might occupy the premises until default was made "in payment of the said sum of £20,000, or the interest thereof, or of some part thereof respectively." The mortgagors' covenant to repay the loan and interest followed in these terms:—"And for the consideration aforesaid the Limerick Market trustees do hereby for themselves, their successors, and assigns covenant and agree with the [trustees of the Economic Life Assurance Society], that they, the Limerick Market trustees, will pay unto the said [trustees of the Economic Life Assurance Society] the sum of £20,000 sterling on the 17th May, next ensuing the date of these presents, with interest for the same after the rate of £5 for every £100 by the year in the meantime until payment thereof, and also that if the said principal sum or any part thereof shall not be paid on the said 17th day of May next,

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then so long as the same sum or any part thereof shall thereafter remain unpaid (but without prejudice to any of the rights or remedies which shall or may accrue to the said [trustees of the Economic Life Assurance Soicety]), they the Limerick Market trustees, their successors, or assigns will pay unto the said [trustees of the Economic Life Assurance Society] by equal half-yearly payments on the 17th day of May and the 17th day of November in every year, interest after the rate aforesaid, to be computed from the said 17th day of November instant, for or in respect of the said principal sum or so much thereof as shall from time to time thereafter remain unpaid." It was further provided that the loan should not be called in for ten years, and that a sinking fund should be accumulated. Then came a covenant by the Limerick Market trustees, "that they shall and will at all times, whilst the said sum of £20,000 and interest for the same or any part thereof respectively shall remain upon the security intended to be hereby made, at their own expense repair, keep in repair," and "insure and keep insured the same messuages or tenements, markets, and other buildings," with power to the mortgagees, in case of the default of the mortgagors, to insure and keep insured the same premises, and a proviso that all moneys paid by them for this purpose "shall be a charge or lien upon the said mortgaged hereditaments and premises, which shall not be redeemed or redeemable until payment shall be made as well of such moneys, with interest for the same as aforesaid, as of the said principal sum of £20,000, and the interest thereof." Power was then given to the mortgagees to take immediate possession if "default shall be made in payment of any part of the principal money intended to be hereby secured at the time and in the manner hereinbefore appointed for payment thereof, or if the interest for the same principal money shall not be paid by equal half-yearly payments on the days hereinbefore appointed for payment thereof."

The deed next conferred a power of sale of the mortgaged hereditaments and premises on the mortgagees in the event of default being made by the mortgagors "in payment of the said principal sum of £20,000 or the interest thereof." And it was thereby agreed and declared that the mortgagees should out of the

money to arise by the sale, first retain their costs of the sale and of obtaining payment "of the said principal sum of £20,000, and interest intended to be hereby secured," and in the next place retain "the said principal sum of £20,000, and interest for the same or so much thereof respectively as shall then remain due and owing, and also such sum or sums" as they shall have paid on account of any insurance, and should pay over the ultimate surplus, if any, to the Limerick Market trustees. Next came provisoes for the protection of purchasers, and a proviso that notice of intention to exercise the power of sale should be given to the mortgagors. Then came a provision that the power of sale or any partial exercise thereof was not to affect the mortgagees' right to foreclose, or "to commence and carry on any action, suit, or other proceeding upon any of the covenants or agreements herein contained or under the said recited Act of Parliament, but they and every one of them shall be at liberty to pursue all or any of such remedies in the same manner as if the said power of sale had not been herein inserted." Proviso that the powers of sale, of giving receipts, and "all other powers incidental to this security may be exercised by any person or persons who shall for the time being be entitled by assignment or otherwise to the principal moneys intended to be hereby secured, or any part thereof for the time being due or unpaid." Covenant by the mortgagors for good title, and that "in case default shall be made in payment of the said sum of £20,000, and interest intended to be hereby secured as aforesaid or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same and the true intent of these presents, it shall be lawful for the said [mortgagees], at all times thereafter, peaceably to enter into and upon and to hold and enjoy the same hereditaments and premises, etc." Covenant for further assurance by the mortgagors.

The Limerick Market trustees obtained further powers of borrowing by an Act passed in the year 1862 (25 Vict. c. xxiii.), the material sections of which are the followiug :—

SECT. 3.—"It shall be lawful for the trustees to borrow, at any rate of interest not exceeding five pounds for the hundred pounds by the year, on mortgage of the lands, works, rents, and tolls vested in or authorized to be

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taken by the trustees by virtue of the Act of 1852, and of this Act, any sum or sums of money not exceeding in the whole the sum of ten thousand pounds, in addition to the sum of thirty thousand pounds authorized to be borrowed by the Act of 1852, and the trustees may from time to time pay off and re-borrow the said further sum or sums, or any part thereof: provided always, that there shall not be due at any one time any greater sum than forty thousand pounds borrowed on mortgage under the authority of the Act of 1852 and of this Act: provided also, that all and every part of the money borrowed under the authority of this Act shall be applied only to purposes by the Act of 1852 or by this Act authorized."

SECT. 4.—"Subject to the provisions of this Act, with respect to the priority of mortgages or bonds granted by the trustees under the authority of the Act of 1852, the interest on the said sum of thirty thousand pounds authorized to be borrowed by the Act of 1852, and the interest on the sum of ten thousand pounds authorized to be borrowed under this Act, shall be a first charge upon all the tolls and charges levied under the Act of 1852 and this Act: and after payment of the interest on such sums respectively, or upon so much thereof as shall be from time to time borrowed under the Act of 1852 and this Act, the trustees shall pay annually to the Town Council of Limerick one-third of their gross income; such one-third to be computed in the manner provided by the fifty-second section of the Act of 1852."

SECT. 10.—"All mortgages or bonds granted by the trustees under the authority of the Act of 1852 shall have priority over all mortgages granted by the trustees under the authority of this Act."

The only other enactment necessary to state is the 16th section of the Limerick Market Act of 1872 (35 & 36 Vict. c. xcvi.), which is as follows:—

"So much of section 52 of the Act of 1852 as provides for the payment of one-third of the gross income of the trustees after the deduction therein mentioned to the council is hereby repealed; and in lieu thereof be it enacted that from and after the first day of September, one thousand eight hundred and seventy-two, the trustees shall pay to the council an annual sum of one thousand four hundred pounds, free of income tax, by equal half-yearly payments, on the first day of March and the first day of September in every year."

The plaintiff was entitled to several mortgages granted under the Act of 1852, securing in the aggregate £5300, with interest at £5 per cent., and to two mortgages granted under the Act of 1862, securing in the aggregate £700, with interest at £5 per cent.

The National Bank was entitled to a mortgage granted under

the Act of 1862, securing the sum of £3000, with interest at £5 per cent.

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On April 12, 1897, the Economic Life Assurance Society recovered a judgment in the Queen's Bench Division against the Limerick Market trustees for the sum of £19,443 7*s.* 9*d.* due for principal and interest on foot of the mortgage of the17th November, 1858, together with £11 3*s.* 6*d.* costs.

Jellett, Q.C., for the Economic Life Assurance Society, in support of the motion.

Herbert Wilson, for the National Bank in support of the objection to the Chief Clerk's certificate.

Morphy, for the plaintiff.

Chaytor, for the receiver.

THE MASTER OF THE ROLLS :—

June 10.

Two questions arise in the present case; the first is as to the right of the first mortgagees, the defendants the Economic Life Assurance Society, to be paid by the receiver their principal in priority to payment of interest upon subsequent mortgages; the second, as to the rate of interest to which they are entitled since April 12th, 1897, the date of the judgment recovered by them in the Queen's Bench Division against the Limerick Market Trustees; it being contended by the National Bank, who are subsequent mortgagees, that since that date *transiit in rem judicatam*, and that only 4 per cent., the rate of interest allowed on a judgment, is recoverable, instead of 5 per cent., the rate provided by the mortgage.

As to the first point, there could be no doubt if it were the case of an ordinary mortgage regulated by the ordinary law. Where lands are pledged to secure a debt as a first charge, the owner of the mortgage is, of course, entitled to principal and interest out of the security as against the mortgagor and his assigns, and in priority to any claim by him or them. But the question does not turn on the ordinary law of mortgagor and mortgagee, but largely depends on the construction of certain local Acts of Parliament, which must be read into and in connexion with the mortgage

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deed of November 17th, 1858. That deed was made between the Limerick Market trustees, acting in pursuance of the Limerick Market Act, 1852, of the one part, and William Routh, Sir Alexander Cornwall Duff Gordon, and Augustus Frederick William Keppel Stephenson, trustees of the Economic Life Assurance Society of the other part. It recites the provisions of the said Act authorizing the trustees to borrow money on mortgage to the extent of £30,000 with interest not exceeding 5 per cent.; that two sums of £10,000 each had been borrowed on the security of mortgages of September 22nd, 1853, and May 3rd, 1854; that the society had agreed to advance to the trustees £20,000 to pay off these mortgages, and had taken a transfer of them. The operative part of the deed then conveys the markets and tolls to the society, subject to a proviso for redemption on payment of £20,000 and interest at the rate thereinafter mentioned. The Market trustees then covenant with the trustees of the society to pay the sum of £20,000 on the 17th day of May next ensuing, with interest at the rate of 5 per cent. per annum in the meantime until payment; and also that if the said principal sum or any part thereof shall not be paid on the said 17th day of May next, then, so long as the said sum or any part thereof shall remain unpaid, to pay by equal half-yearly payments on the 17th day of May and 17th day of November in every year interest at the rate aforesaid on the said principal sum, or on so much thereof as shall from time to time remain unpaid.

It will be observed that the covenant in its frame is one and undivided. The local Acts necessary to refer to are three, passed in the years 1852, 1862, and 1872 respectively, but the last-mentioned Act is of little importance. The Act of 1852 (15 Vict. c. civ.) by section 24 authorized the trustees to borrow at any rate of interest not exceeding 5 per cent. per annum on mortgage of the lands, markets, rents, and tolls, by the said Act authorized to be purchased, hired, appropriated, or taken, or of any property which might be vested in the trustees by virtue of the said Act, not exceeding in the whole the sum of £30,000 for the purposes of the said Act, and from time to time to pay off and re-borrow the same, or any part thereof, but so that there shall not be due at any one time more than the said principal sum of £30,000. Section 25

prescribes the form of mortgage as follows:—"Every mortgage authorized to be made under the provisions of this Act shall be by deed under the common seal of the said trustees, duly stamped, in which the consideration shall be truly stated, and may be respectively, according to the form in Schedule A to this Act annexed, or according to the form in Schedule B to 'The Commissioners Clauses Act, 1847' annexed, or to the like effect respectively." The form in Schedule A is very short. By it the trustees, in consideration of the sum of £ , paid by A B, of , for the purposes of the said Act, "grant and assign to the said A B, his executors, administrators, and assigns, the said undertaking, and the rents, tolls, and other moneys arising by virtue of the said Act, and all their estate, right, title, and interest in the same, to hold unto the said A B, his executors, administrators, and assigns, until the said sum of £ , together with interest for the same at the rate of for every £100 by the year, be satisfied." Then follows in brackets the words:—"The principal sum to be repaid at the end of years from the date hereof." These words are not unimportant; they may or may not be used according to circumstances, and would not be necessary if it was intended to leave the money outstanding as a permanent investment.

I need not do more than refer to the form in the Act of 1847, which resembles it, and with which I dealt at an earlier stage of this case (1). Section 26 provides that the mortgagees may enforce payment of the arrears of principal and interest due on any such mortgages by the appointment of a receiver, but in order to authorize the appointment of such receiver in the event of the principal moneys not having been paid, the amount owing to the mortgagee must be not less than £500. The next section of importance is section 52, which deals with the application of money arising from tolls, &c., under the Act. It provides "that all moneys arising from the rents and tolls to be levied and taken as aforesaid, and all moneys which shall be borrowed on mortgage as aforesaid, and all moneys which shall come to the hands of the trustees otherwise howsoever under the Act, shall be applied and disposed of as

(1) [1899] 1 Ir. R. 229.

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follows:—1st, in defraying the charges and expenses of the Town Council, Grand Jury, and the Chamber of Commerce respectively, preparatory and incident to the passing of this Act; 2ndly, in paying the interest of the moneys to be borrowed as aforesaid; 3rdly, in paying to the Council one-third of the gross income of the trustees, such one-third to be computed after providing out of the said gross income for the interest of all sums of money to be raised for the purposes of this Act: and after the principal moneys to be borrowed as aforesaid shall have been paid, the said one-third to be computed after deducting £1000 per annum from the gross receipts for the purposes of this Act; 4thly, in paying the salaries and expenses of the officers appointed for carrying this Act into execution, and making, providing, regulating, and maintaining the markets and market places hereby authorized, and carrying all the purposes of this Act into execution; and 5thly, in paying off the principal of the moneys so borrowed as aforesaid; and the residue (if any) in the hands of the trustees after the purposes aforesaid shall have been effected shall be paid and applied for such public purposes within the limits of this Act as the said trustees may think fit." Section 16 of the Act of 1872 repeals so much of section 52 of the Act of 1852 as provides for the payment of one-third of the gross income of the trustees after the deduction therein mentioned, and provides that in lieu thereof the trustees shall pay to the Council an annual sum of £1400 by equal half-yearly payments on March 1st and September 1st in every year. It substitutes a fixed payment, but leaves the rest of section 52 untouched. The Act of 1862, section 3, empowers the trustees to borrow at any rate of interest not exceeding 5 per cent. per annum on mortgage of the lands, works, rents, and tolls vested in or authorized to be taken by the trustees by virtue of the Act of 1852 any sum or sums of money not exceeding in the whole the sum of £10,000, in addition to the sum of £30,000 authorised to be borrowed by the Act of 1852. Sect. 4, which deals with payment of interest on money borrowed under the Act of 1852 and this Act, is as follows:—"Subject to the provisions of this Act with respect to the priority of mortgages or bonds granted by the trustees under the authority of the Act of 1852" (this refers to section 10, which provides that "all mortgages or bonds granted by the trustees under the

authority of the Act of 1852 shall have priority over all mortgages granted by the trustees under the authority of this Act"), "the interest on the said sum of £30,000 authorized to be borrowed under the Act of 1852, and the interest on the sum of £10,000 authorized to be borrowed under this Act shall be a first charge upon all the tolls and charges levied under the Act of 1852 and this Act; and after payment of the interest on such sums respectively, or upon so much thereof as shall be from time to time borrowed under the Act of 1852, and this Act, the trustees shall pay annually to the Town Council of Limerick one-third of their gross income, such one-third to be computed in the manner provided by the 52nd section of the Act of 1852." This makes interest on the £30,000 and £10,000 a first charge. But section 10 says that the mortgages under the Act of 1852 are to have priority. Accordingly as between the two classes of mortgages the £30,000 must have priority: but, subject to that, interest on both is to be a first charge. The last paragraph of the section is repealed by the section of the Act of 1872, to which I have already referred.

That code is important in reference to this question. It is plain that the Act of 1862 was intended to add on the £10,000 to the £30,000 raised under the Act of 1852; but, inasmuch as at the time the contract was entered into the lenders of the £30,000 under the Act of 1852 were not to be deprived of their security, their priority was preserved *inter se*. The question is the same as to interest as between the mortgagees under the Act of 1852 and those under the Act of 1862, but in neither case can the principal take priority over the interest which is expressly made a first charge. There has been no sale. We are dealing only with income not *corpus*. I am therefore of opinion that the motion on this point must fail.

As to the second point, I have already referred to the forms of mortgage prescribed by section 25 of the Act of 1852. The form actually adopted here is that of a long and elaborate mortgage, the preparation of which, no doubt, brought in considerable costs to the solicitor who prepared it, but in substance it must be construed as being of "the like effect" as the short statutory form. The reference in both forms to the repayment of the principal at the end of years from the date thereof is, I think, to be

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understood as applying to cases where the repayment was for the convenience of the parties to be arranged at a definite time, whether five, ten, twenty, or fifty years, or the like, and has little connexion with the more or less formal agreement in ordinary mortgages by private owners for repayment of principal in six months, when everyone knows there is not on either side the smallest intention of paying off the loan at that time. The mortgages authorized by the Act are public securities, and meant to be permanent, that is, not necessarily perpetual, but certainly not merely temporary. When, then, we find a covenant to pay off on the 17th May, 1859, £20,000 borrowed on the 17th November, 1858, with interest in the meantime at 5 per cent., and in and as part of the same covenant, not even in a separate agreement, but in the same sentence, "and also," without any pretence of a separate and distinct contract—an agreement that if the said principal sum shall not be paid on May 17th, then so long as the same or any part thereof shall remain unpaid, the mortgagors shall pay interest half yearly at 5 per cent., it seems to me clear that the whole is simply one contract or covenant, just as if the form in Schedule A had been adopted. Had that form been adopted, it is clear in this case the clause in brackets naming a time for repayment would have been omitted as inapplicable. But even on the face of the deed itself there are not two covenants, but one; and if that one is to be split up into two parts (as no doubt grammatically it may) the latter part is, to say the least, subsidiary to the former. Both amount to an agreement to pay interest at 5 per cent. till the stipulated day, and afterwards.

How, then, does the law stand? It is impossible to read *Ex parte Fewings* (1) without seeing that, while *Popple* v. *Sylvester* (2) was not overruled, it was not relished by Cotton and Lindley, L.JJ., and *Ex parte Fewings* (1) was distinguished on grounds that may apply to this case. But whether this is so or not, the fact remains that here there are not two independent separate covenants, but only one; and that even if that one can be split up into two parts (as in some of the cases referred to was the case), the latter part must be merely ancillary to the former, having regard to the fact

(1) 25 Ch. D. 338. (2) 22 Ch. D. 98.

that the mortgage must be of the like effect as that contained in the statutory forms. The trustees are a body corporate, and they do not personally contract. Their obligation binds them in their corporate capacity alone, and in defining their duties the statute defines their obligations also. In *Lowry* v. *Williams* (1) Walker, L.J., then Lord Chancellor, says at p. 281—"Those cases appear to establish: 1, that if there is a covenant in a mortgage to pay a principal sum and interest at a contract rate on a named day and no further covenant, a judgment recovered for the principal sum and interest to date merges the debt, and interest at 4 per cent. only on the judgment is recoverable, even though property is assigned as a security; 2, that if there is such a covenant as last mentioned, and also a covenant that if the principal sum remains unpaid after the day named, interest at a certain contract rate shall be paid, while the principal sum or any part thereof remains unpaid, and judgment is recovered for the principal sum and interest to date, there is nothing left for the subsequent covenant to pay interest to operate upon, as the covenant to pay the principal has been merged and gone, and therefore a claim or action on such subsequent covenant will fail; 3, but if such subsequent covenant is in the form of an obligation to pay interest at a contract rate, while the principal money remains due *on the security of the indenture or equivalent words*" which do not occur in this deed, "and property has been mortgaged or charged to secure the loan, and the claim is to realise the subsequent interest at the contract rate out of the security, then the subsequent covenant is independent, and must have full effect given to it as against the property charged or its proceeds. The distinction is, as Stirling, J., in effect, says, a somewhat fine one, but the cases establish it, and in three Courts it has been either laid down or recognised as valid. Apply these rules to the security before the Court. There is first a covenant to pay the principal with interest at a named day; there is a distinct covenant to pay interest at an agreed rate while any principal money secured by the mortgage remains unpaid, and the mortgagee is seeking payment out of the security. There is no distinction between the form of covenant here and that in *Popple* v. *Sylvester* (2),

(1) [1895] 1 I. R. 274.

(2) 22 Ch. D. 98.

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'so long as the sum of £3000 or any part thereof shall remain due on the security of this indenture.' Under these circumstances I am of opinion that the point is ruled by authority, which has been reviewed but not impeached, and that the appeal should be dismissed." O'Brien, L.C.J., says:—"The case is undistinguishable from *Popple* v. *Sylvester* (1)." FitzGibbon, L.J., says:—"I agree that this case cannot be distinguished from *Popple* v. *Sylvester* (1), which has been recognised, though distinguished, in *Ex parte Fewings* (2). But I confess that the distinction between the English cases is very fine, and I think it would have been a more satisfactory principle to lay down that every covenant for the payment of interest upon a debt is 'subsidiary' to the covenant for payment of the principal, and that when the principal has passed into *rem judicatam* no larger sum should be recoverable, for either principal or interest, than what was recoverable under the judgment. Such a principle would be in accordance with the reasoning of Lord Bramwell in the *European Central Railway Company* (3), and though *Popple* v. *Sylvester* (1) was recognised in *Ex parte Fewings* (2), Lord Justice Fry was then a member of the Court of Appeal; and the other members of the Court distinguished, rather than adopted, his previous decision, which I find it difficult to reconcile with what seems to me to be a corollary from Lord Bramwell's *dictum*, that 'there cannot be two debts,' namely, that 'the sole debt between the parties' cannot bear two rates of interest."

I am of opinion that the judgment in this case merged the debt once and for all, and that the rate of interest recoverable upon it is not that of the mortgage, but that which the law allows in the case of judgments. This, of course, only applies to the period since the judgment, that is, 4 per cent., from April 12th, 1897.

W. L.

(1) 22 Ch. D. 98. (2) 25 Ch. D. 338. (3) 4 Ch. D. 33.

The Economic Life Assurance Society appealed to the Court of Appeal (LORD ASHBOURNE, C.; FITZGIBBON and HOLMES, L.JJ.).

Henry, Q.C., and *W. M. Jellett, Q.C.* (with them *Chaytor*), for the appellants.

Ronan, Q.C. (with him *Herbert Wilson*), for the National Bank.

Matheson, Q.C. (with him *Morphy*), for the plaintiff.

LORD ASHBOURNE, C.:— Dec. 21.

Lord Justice FitzGibbon will deliver the judgment of the Court.

FITZGIBBON, L.J.:—

Subject to a verification of amount, we think that the order appealed from should be affirmed, and that the appeal should be dismissed with costs. The first question relates to priority, and upon it I believe that we are entirely agreed. The second affects the rate and amount of interest to which the appellants are entitled. It involves the reconsideration of the decision of this Court in *Lowry* v. *Williams* (1), and as I am the only member of the present Court responsible for that decision, I must discuss that part of the case more fully.

The first question is as to the relative priorities of the interest and the principal respectively of the mortgage debts created by the Limerick Market Trustees under the local Acts of 1852 and 1862, against moneys coming to the hands of the Receiver from the market undertaking.

The fundamental fact to be borne in mind is that the money-producing property mortgaged consists of lands and buildings held in trust for the purposes of public markets, and of tolls and other income produced by those markets. The property is in its nature and by law permanent, and it is not saleable or realisable, so far as it consists of fixed capital as distinguished from income. The Acts assume the maintenance of the markets as the essential

(1) [1895] 1 I. R. 274.

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condition of the production of any money available for the mortgagees. Both by the local Acts and also by the incorporation of the Commissioners Clauses Act, 1847, the only means for recovery of either interest or principal due on the mortgages are the appointment of a Receiver, and the application of surplus income by way of a sinking fund. The foreclosure or sale of the undertaking do not seem to be contemplated.

The Act of 1852, sect. 52, makes "all moneys which shall come to the hands of the trustees" applicable in the following order:—

1. In defraying the costs of the Act.

2. In paying the interest of the £30,000 borrowed under the Act.

3. In paying to the Municipal Council one-third of the gross income less by the interest.

4. In paying the salaries and expenses of the officers, of maintaining the markets, and of carrying the Act into execution.

5. In paying off the principal of the mortgages.

The residue (if any) is devoted to public purposes.

The Act of 1862, sect. 4, declares the interest on the £30,000 borrowed under the Act of 1852, and the *interest* on the additional £10,000 borrowed under the Act of 1862, to be "a first charge" upon all the income under both Acts, but subject to the provision of sect. 10, that all mortgages under the Act of 1852 shall have priority over all mortgages under the Act of 1862.

Sect. 26 enacts that, except as otherwise expressly provided, nothing in that Act shall alter the Act of 1852.

The effect of these two Acts is, in our opinion, perfectly plain. It is, as the Master of the Rolls has held, to place the priority of the interest on the £10,000 of 1862 immediately after the interest on the £30,000 of 1852, and to place the principal of the £10,000 immediately after the principal of the £30,000.

As the payment to the Municipal Council, and the expenses of maintaining the markets and of carrying the Act into execution, stood above the repayment of the principal of the £30,000, though below the interest upon that sum, the interest upon the £10,000 must equally go, as part of the first charge under the Act of 1862, sect. 4, above the payment to the Council, above the salaries and

expenses, and *a fortiori* above the principal both of the £30,000 and of the £10,000.

The Act of 1872, sect. 16, commuted the one-third of the gross income less by the interest, as ascertained by computation under 1852, sect. 52, into a fixed annual sum of £1400. It made no alteration in the priorities.

The answer to the difficulties suggested with reference to the salaries and expenses is that, although these are puisne to the interest so long as they are payable out of moneys that come to the hands of the trustees, the Act assumes that the markets will be maintained. If they continue to be maintained by the trustees, the trustees must not pay the salaries or expenses, unless they have money enough in their hands to pay the interest. If they fail to do this, and if a Receiver is appointed, he will have nothing to receive unless the markets are maintained. Whether the Act was passed as it is, merely because the risk of there not being money enough to maintain the markets after paying the interest was ignored, or because it was assumed that the expenses of maintaining the money-producing undertaking would be paid by the Receiver or by the mortgagees, as the necessary cost of managing the mortgaged property, it is immaterial to discuss. In no case could *any principal* be paid off until the interest, the expenses, and the contribution to the Municipal Council had all been paid.

We have now to deal with income only, and, in its application, the postponement of the principal of the mortgages both of 1852 and of 1862 is thus established.

If we assume, contrary to our opinion, that foreclosure or sale might take place, the mortgagees on foreclosure would have to maintain the markets out of whatever they received; and, when the markets were sold, the price would be *corpus* or capital, and the proceeds would be applicable, first to pay arrears of interest, and then (subject to the claim of the Municipal Council) to discharge the principal of the mortgages, and the salaries and expenses would *ex hypothesi* be at an end, because the purchasers would have to carry on the markets at their own cost, or to close them.

For these reasons we entirely agree with the judgment of the Master of the Rolls (which, indeed, I have only paraphrased) upon the first question. The second question is as to the interest to

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which the Economic Insurance Company are now entitled as the transferees of mortgages for £20,000 under the Act of 1852, and as mortgagees under the deed of November 17, 1858, since April 12, 1897, when they recovered judgment in the Queen's Bench Division for £19,443 7*s.* 9*d.* as the sum then due to them on foot of their demand under their deed.

It is not quite clear whether the whole of this sum is still due, or whether anything has been paid in reduction of it. If the whole sum is not due, the sum actually due must be ascertained.

I concurred in the decision of *Lowry* v. *Williams* (1) solely because I could not distinguish that case from *Popple* v. *Sylvester* (2), which had been distinguished by the English Court of Appeal from *Fewings' Case* (3), and was, therefore, equally binding upon us with *Fewings' Case* (3). After *Lowry* v. *Williams* (1), we cannot question either of them; and, though they were decided in opposite ways, they cannot be regarded as inconsistent with each other, because Fry, L.J., decided them both, and both carried the weight, not only of his name, but of the authority of the Court of Appeal of which he was a member, which recognised the one in deciding the other. The only question open to us now is, which of them rules this case?

Let us see what the two opposing principles are which have given rise to the controversy. I go back to earlier cases for a statement of them. In *Clarke* v. *Lord Abingdon* (4), the creditor had two securities—one by bond, the other by mortgage. Sir W. Grant said:—

> "If he sues upon the former, he cannot have interest beyond the penalty. But the mortgage is to secure payment, not of the bond, but of the sum for which the bond was given, together with all interest that may grow due thereon. The same sum, therefore, is differently secured by different instruments; by a penalty, and by a specific lien. The creditor may resort to *either*, and if he resorts to the mortgage, the penalty is out of the question. The mortgage is not for that."

This is the root of the principle that "a mortgagee may pursue all his remedies."

(1) [1895] 1 I. R. 274.
(2) 22 Ch. D. 98.
(3) 25 Ch. D. 338.
(4) 17 Ves. 106.

It might have been then open to Courts of Equity, and perhaps it is still open to the House of Lords, to hold that a mortgagee whose debt is secured (*a*) by a contract on which he can sue at law—a bond, covenant, or *indebitatus assumpsit*, on which he can recover judgment and have execution for whatever principal and interest is due to him; and (*b*) by a pledge of or charge or lien upon specific property—such as a mortgage—may pursue each of these remedies irrespectively of the other; in other words, that he may recover judgment and have execution at law for all that law will give him; and may, at the same time, continue to hold his pledge until he has been repaid the full amount of principal and interest which the debtor originally contracted to pay him, notwithstanding that he has ascertained a different amount, as *res judicata*, to be due to him as principal under a judgment, which carries a fixed rate of interest by statute. But it is settled by a series of authorities binding upon us that he cannot do this. Though he can "pursue all his remedies," they can only be pursued to the same end—*i.e.*, *for the same debt*; and where there is but one contract of debt, and a pledge of property to secure that debt, if the amount of that debt has been ascertained by a judgment at law, the same amount, and no more, can be recovered out of the pledged property. The same sum which satisfies the judgment will redeem the pledge, and the same principle applies whether the amount is recovered by the one remedy or by the other, or partly by the one and partly by the other.

In *Florence* v. *Jenings* (1) the defendant, in consideration of the plaintiff's discounting a bill for £250, undertook, if the bill was not wholly paid at maturity, to pay, *as interest thereon*, £20 per month until the same was wholly *paid and satisfied*. The bill not having been paid at maturity, the plaintiff sued the defendant, declaring on the bill, and claiming interest at £20 per month, and he obtained judgment for £265 9*s*. 6*d*. He afterwards sued upon the agreement for subsequent interest at £20 per month, and it was held that he could not recover it. Cockburn, C.J., held:—

> "When judgment was recovered, the claim upon the bill passed into *res judicata*, so that any further interest payable would be upon the

(1) 2 C. B. (N. S.) 454.

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judgment under the statute, not upon the bill, and the right to interest under the agreement ceased."

This is the root of the principle that where there is a contract to pay a principal sum, with interest at an agreed rate until payment, if judgment is recovered for the principal debt, with the stipulated interest to the date of the judgment, the debt is merged in the judgment, and no subsequent interest is recoverable on the contract: the contract to pay such interest is subsidiary to the contract to pay the principal, and goes with it, and thenceforth further interest is payable only by virtue of the judgment, and under the statute, at the rate of 4 per cent. upon the amount of the judgment.

The Agriculturist Cattle Insurance Company's Case. (1) establishes an exception to this principle. There the defendants agreed to give their creditor judgment for £3536 0*s.* 11*d.* for principal and interest on £3000, which by contract bore interest at 6 per cent. But it was, at the same time, agreed that the loan of £3,000 should continue, and that the judgment should not be enforced for two years, and that the judgment should stand as collateral security for the £3000 and interest at that rate.

There it was held that the creditor was entitled to interest on the £3000 at 6 per cent. subsequent to the judgment, on the manifestly just ground that there was a distinct agreement with a distinct consideration—viz., forbearance to enforce the judgment; that the plaintiff was entitled to sue and to recover upon this agreement; and that it was not merged in the judgment.

But the *European Central Railway Company's Case* (2) fixes a limit to this exception. There the Oriental Financial Corporation recovered judgment against the Railway Company on debentures for £20,000 principal, with interest and costs, amounting in all to £20,636 8*s.* 4*d.* The debentures bound the Railway Company by contract to pay the principal sum of £20,000, with interest at 6 per cent., on October 11, 1865; the interest to be payable *in the meantime* half-yearly until the repayment of the principal; and, for further securing payment of *such* principal and interest, the Com-

(1) 4 Ch. D. 34, in note.

(2) 4 Ch. D. 33.

pany charged their undertaking with the repayment of the same. There was no distinct covenant for payment of the interest subsequent to the date of redemption. The creditor argued that "the mortgagee had the right to pursue all his remedies," and that "the fact of his having obtained judgment at law did not take away his right to hold his charge until he had received his principal and interest at the contract rate—viz., 6 per cent." The Railway Company admitted the right of the mortgagee to pursue all his remedies, but contended that, if a mortgagee who was entitled to 6 per cent. obtained judgment for the principal sum and interest, and afterwards filed a bill for foreclosure, he should only be allowed interest at 4 per cent. upon the amount of the judgment after its date. This contention was upheld by the Court of Appeal, and this case establishes that, where there is a single contract for payment of principal and interest, and judgment is recovered upon it, the pledge cannot be held for any subsequent interest under the contract, but only for what is recoverable under the judgment. Lord Bramwell held that, from the date of the recovery of the judgment, the £20,636 8*s.* 4*d.*, by virtue of the Act, carried interest at 4 per cent., and became the sole debt, and the creditor could enforce payment of that sum, with interest at 4 per cent., and could enforce nothing more. He says:—

> "The original debt is gone: *Transit in rem judicatam*: a fresh debt is created with different consequences. The judgment *is now the charge*: there cannot be two debts, one leviable by execution, the other charging the undertaking. There cannot be a charge for more than is due. It is said that it is a hardship upon the appellants, because they are worse off by reason of their diligence in bringing the action. But they were not compelled to bring the action: they brought it in order to obtain the advantage of an execution. If, therefore, there has been any hardship, it was not inflicted upon them by the law, so as to make us doubt whether the law could be so . . . There is no other agreement than that which has been converted into a judgment. There is no other debt or obligation affecting them."

It is material to observe that the question there arose in a winding-up, and it was, as here, a contest between debenture-holders who had a charge upon the entire undertaking, and subsequent creditors.

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These cases bring us to the point that, if the contract for payment of principal and interest is indivisible, and if judgment is recovered upon that contract, the debt is gone, and further interest can be recovered only upon the amount of the judgment and under the statute. Furthermore, that where there is a pledge to secure the performance of the contract, the charge may be enforced for the amount of the judgment, with the statutory interest upon it, but for nothing more. Then came *Popple* v. *Sylvester* (1), which was the same as *Lowry* v. *Williams* (2). To demonstrate their identity, I put the contracts in the two cases side by side.

Popple v. *Sylvester* (1).

The mortgage deed contained separate covenants—1st, that the defendant should pay £3000, with interest at 7 per cent., on the day provided for payment; 2nd, that in case the £3000 should not be paid on the day, the defendant would, "so long as the sum of £3000, or any part thereof, should remain due *on the security of the said indenture*," pay interest for the £3000, or for so much thereof as should for the time being remain unpaid, after the rate aforesaid.

Lowry v. *Williams* (2).

The defendant covenanted to pay the sum of £65, with interest thereon at 60 per cent., and also future advances, with interest thereon at 60 per cent. And also, that as long as principal money, *secured by the mortgage*, should remain unpaid after the day on which such principal money should become due *according to the terms of the mortgage*, the mortgagor would pay to the lender interest thereon, or on so much thereof as should for the time being remain unpaid, at the said rate of 60 per cent., by monthly payments.

In both cases the attempt was successfully made to bring them within the decision of *The Agriculturist Cattle Case* (3), and to distinguish them from *The European Central Railway Case* (4), by showing, as matter of construction, that there were distinct and independent covenants for the payment of the interest subsequent to the judgments, which were not merged in the judgments because they expressly stipulated for payment of such interest so long as any principal was outstanding on the security of the mortgages. Unless the words "so long as a sum remains due on the security of an indenture," and the words "as long as money

(1) 22 Ch. D. 98.
(2) [1895] 1 I. R. 274.
(3) 4 Ch. D. 34.
(4) 4 Ch. D. 33.

secured by a mortgage remains unpaid," could be differently construed, the instruments were identical in effect. The question which Fry, J., decided in favour of the mortgagee was that the judgment had not put an end to that part of the contract which bound the mortgagor, so long as any part of the £3000 remained due on the security of the indenture, to pay interest for it at 7 per cent. He admitted that the payment had extinguished the covenant to pay the £3000; but he held that, notwithstanding the judgment, the express covenant to pay 7 per cent. on that sum continued in force, so long as it remained due on the security of the indenture. He said, "Part of the security is extinguished by the judgment" (which had been paid), "and part remains." He described the part which remained as an express covenant to continue the payment of interest so long as the security should continue, and he therefore upheld the creditor's claim for £652 14*s.* 4*d.*, being the difference between interest on the £3000 at 7 per cent. secured by the mortgage, and the interest at 4 per cent. on the £3145 10*s.* 7*d.*, the amount of the judgment which had been paid. There, as here, the judgment included interest at the contract rate up to the date of the judgment, and the creditor's right to receive 4 per cent. on the whole amount of the judgment was upheld, subject to giving credit for it against the 7 per cent. on the £3000.

In *Lowry* v. *Williams* (1) I ventured, with deep respect, to say that I found it difficult to reconcile this decision with what seemed to me to be a corollary from Lord Bramwell's *dictum* in the *European Central Railway Case* (2). I must now express myself more clearly, for I think that both *Popple* v. *Sylvester* (3) and *Lowry* v. *Williams* (1) have extended the principle of *The Agriculturist Cattle Case* (4) to a point which encroaches on the principle of *The European Central Railway Case* (2), and of *Fewings' Case* (5).

I admit that if there is a distinct contract for the payment of subsequent interest at an agreed rate, for a distinct consideration,

(1) [1895] 1 I. R. 274.
(2) 4 Ch. D. 33.
(3) 22 Ch. D. 98.
(4) 4 Ch. D. 34.
(5) 25 Ch. D. 338.

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such as forbearance to enforce the judgment, that agreement cannot be merged in a judgment for the original debt. But I think that the test is whether a fresh action can be brought upon the agreement which is alleged to be distinct, or whether the judgment could be pleaded as an answer to that action, as the judgment was pleaded in *Florence* v. *Jenings* (1). My doubt of the decision in *Popple's Case* (2) arises from the fact that the principal debt upon which the payment was recovered was the same debt upon which the subsequent interest accrued; and there was no additional consideration, and no distinct contract for forbearance, such as existed in *The Agriculturist Cattle Case* (3), for payment of the subsequent interest after the original loan had passed into *rem judicatam*, and the contract to pay it had gone. The Court of Appeal in *Fewings' Case* (4) adopted vague words, such as "incidental" or "subsidiary" to describe the covenants which will fall with the covenant to pay the principal, and contrasted them with the "distinct" or "independent" covenants which will not merge in a judgment for the principal debt. The difference thus becomes one of construction and of form, and the refinements to which this leads are shown by the judgment of Stirling, J., in *Bunsilall's Case* (5) where he held that a covenant to pay instalments covering principal and interest "*until* the whole amount with interest of a bond bearing interest at 18 per cent. should be *finally liquidated*," was governed by *Fewings' Case* (4), and not by *Popple's Case* (2); and he held the covenant to be merely "subsidiary to the stipulation for payment of the principal," although the contract to pay was expressed to take effect "if the debtor should fail to pay any instalment, or quit India" (which he did) "*before the final liquidation of the bond.*" I apprehend that the distinction cannot be satisfactorily observed until it is placed on the basis of some additional or distinct consideration, and of a really distinct and additional contract to pay the subsequent interest, founded on such consideration.

But, be this as it may, we are bound by *Fewings' Case* (4), and

(1) 2 C. B. (N. S.) 454.
(2) 22 Ch. D. 98.
(3) 4 Ch. D. 34.
(4) 25 Ch. D. 338.
(5) 62 L. T. (N. S.) 234.

to prove that this case is identical with it, I again place the covenants side by side.

Ex parte Fewings (1).

The mortgagor covenants that he will, on the expiration of six calendar months after the day on which the living shall become vacant, pay the sum of £2200, with interest at 5 per cent., from the said day up to the expiration of such six calendar months. *And further*, that if the said sum of £2200, or any part thereof, shall remain unpaid, after the expiration of such six calendar months, he will, *so long as the same sum, or any part thereof*, shall remain unpaid, pay interest for the said sum of £2200, or for so much thereof as shall for the time being remain unpaid, at 5 per cent., by equal half-yearly payments, the first to be made on the expiration of twelve calendar months next after the living shall become vacant.

Mortgage of Nov. 17, 1858.

The Market Trustees covenant to pay £20,000 on May 17 next, with interest at 5 per cent. in the meantime, until payment thereof. *And also*, that if the said principal sum, or any part thereof, shall not be paid on the said day, then, *so long as the same, or any part thereof, shall thereafter remain unpaid*, the Market Trustees will pay, by equal half-yearly payments on every May 17 and Nov. 17, interest after the rate aforesaid from the 17th Nov. inst., for or in respect of the said principal sum, or so much thereof as shall from time to time thereafter remain unpaid.

In *Fewings' Case* (1), Bacon, V.-C., appears to have fallen back to the principle, held by *Florence* v. *Jenings* (2), and the *European Central Railway Case* (3), not to be law, that the amount secured by a mortgage might be larger than the amount of the judgment recovered in debt upon the covenant in the mortgage deed, and that the remedy under the mortgage might be pursued by holding the pledged property until more was paid than was recoverable under the judgment: in short, that each remedy was unaffected by what was done in pursuing the other. He says:—

> "The execution did not affect the rights under the mortgage. The mortgagee had a right to the sum for which the judgment was recovered, but she was not obliged to give up her rights under the mortgage deed. To hold that the judgment puts an end to the covenant to pay 5 per cent. interest would be absurd, as the covenant did not

(1) 25 Ch. D. 338. (2) 2 C. B. (N. S.) 454. (3) 4 Ch. D. 34

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begin to operate until after the judgment was signed. Interest at 4 per cent. was payable by law under the judgment, but the debtor also owed 5 per cent. on the covenant in the mortgage deed, and the judgment which gave 4 per cent. could not have the effect of taking the seal off the mortgage deed which covenanted for payment at 5 per cent."

We heard all this in argument from the appellant's counsel here: it may be open to the House of Lords to hold that it is law; but it was reversed by the Court of Appeal.

In *Fewings' Case* (1), the original principal debt was £2200; the judgment was marked for £2285 13*s.* 4*d.*; and the question arose between creditors. It arose in a curious way; in form as to whether the mortgagee was bound by a composition, but the substance of the question was what was the true amount of the debt which was payable to the mortgagee, which, if paid, would entitle the mortgagor to redeem, and it was held that this debt was no more than the amount of the judgment, with statutory interest thereon at 4 per cent. The judgment had by inadvertence been undermarked, for it included interest at the contract rate only up to the date of the writ, though it might have been included up to the date of the judgment. Yet even as to this intervening interest, Cotton, L.J., held that because the creditor in marking judgment had not claimed it, he could not afterwards recover it, *either by a separate action or under his charge.* He said:—

> "So soon as the judgment was obtained it put an end to the liability under the covenant, and the debt became due on the judgment, not under the covenant." . . . "The covenant to pay the subsequent interest was not a separate covenant, but was only a covenant that interest at 5 per cent. should be paid so long as any part of the £2200 remained *due under the covenant*—so long as the covenant for payment of the £2200 remained in force so as to enable the mortgagee to sue upon it, and to enforce payment of that sum, or any part thereof."

Lindley, L.J., held that the question was, What does "unpaid" mean? and that the true construction of the covenant was

(1) 25 Ch. D. 338.

that so long as the debt was due *under the covenant*, interest at 5 per cent. should run. He says:—

> "It may be technical, but it is well settled, that if there is a debt secured by a covenant, and judgment is recovered on the covenant, the debt on the covenant merges in the judgment debt. In point of law the £2200 is no longer payable under the covenant: it is payable under the judgment. The covenant to pay interest is gone, and the judgment debt bears interest only at 4 per cent. . . . The interest to which the creditor is entitled is that which the judgment debt bears, and no other."

Fry, L.J., concurred in all this, and explained the reason of his decision in *Popple* v. *Sylvester* (1), by saying that there was an independent covenant for the payment of interest, and that he had held, as a matter of construction, that that covenant remained in force so long as any principal money could be recovered by the mortgagee in an action for the foreclosure or the redemption of the mortgage. That case rules the present, and supports the judgment of the Master of the Rolls.

I have carefully read the elaborate mortgage of the 17th November, 1858. It repeatedly refers to the secured debt as "the principal sum of £20,000, and *the interest thereof*." It contains nothing, beyond what I have quoted, which could extend the obligation, or which could be construed as a special, distinct, or independent covenant, to pay interest at 5 per cent., beyond the period during which the principal sum should remain "*unpaid*," or "*due*," or "*owing*." These words are decided in *Fewings' Case* (2) to be insufficient to sustain this appeal. It is a curious coincidence, however, that it does contain a distinct covenant to repair and to insure the mortgaged premises "whilst the said sum of £20,000, and interest for the same or any part thereof, shall remain *unpaid upon the security to be hereby made*." Had those words occurred in the covenant for the payment of interest after the day of redemption, *Popple* v. *Sylvester* (1) and *Lowry* v. *Williams* (3) would have applied, instead of *Fewings' Case* (2)—a startling proof of the subtleties of distinction in which we have become involved.

(1) 22 Ch. D. 98. (2) 25 Ch. D. 338. (3) [1895] 1 I. R. 274.

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The further point, not raised at the Rolls, was argued here, that the interest secured by the original mortgages of 1853 and 1854, namely, 4½ per cent. on £10,000, and 5 per cent. on the remaining £10,000, could be now recovered by the appellants under those instruments. This cannot be sustained. These mortgages were transferred to the appellants by the original mortgagees, by deeds of even date with the mortgage of November 17th, 1858; but the new mortgage is in express terms a "further security" for the same debt. It brought in additional lands and buildings, it altered the rate of interest, and it alone contains the contract between the appellants and the mortgagors. It is impossible to hold that the original securities could be enforced, or that the original mortgage could be held, for the recovery of any sum whatsoever which was not also recoverable under the later contract. The proviso for redemption in both the old and the new mortgages must take effect upon payment of the same sum: whether by way of debt or of charge, the new mortgage and the old mortgage secured but one and the same amount.

One point, small in amount, remains. It does not appear to have been adverted to at the Rolls, and, unless the amount of the judgment has been reduced by some payment, it arises upon what I cannot consider to be anything more than inadvertence in drawing up the order. The order declares the appellants entitled "to interest at 4 per cent. from April 18th, 1897, on the sum of £19,069 16*s.* 8*d.*, *being the amount now due to them on foot of their judgment* dated April 12th, 1897." This was not the amount of the judgment; it was the amount marked on the writ as being then due *for principal* on foot of the original £20,000. The judgment was marked not for £19,069 16*s.* 8*d.*, but for £19,443 7*s.* 9*d.*, which included £373 11*s.* 1*d.* for interest at 5 per cent. to the date of the judgment. The Master of the Rolls, in his judgment, never indicates any idea of giving the appellants less than the amount of their judgment with statutory interest upon it, and the words of the order give them that, though the figure appears to have been taken, not from the judgment, but from the writ. If the interest has been since paid, the order is right. All the authorities upon which I have relied speak of *the amount of the judgment*, with statutory interest *thereon* at 4 per cent., as being

the sum which a mortgagee, who has recovered judgment, is entitled to enforce under his charge. When the contract debt has been merged in a judgment it is a misapprehension of the legal position to say that the contract rate of interest upon the original principal has been *reduced*. It is gone. To give the appellants interest on £19,069 16*s.* 8*d.* only, if more was due on the judgment, would be self-contradictory. It would amount to this—"Your contract is gone, for principal and interest at 5 per cent. have been merged, but it remains in force for the purpose of lessening the amount which is to bear the statutory rate interest: the judgment has ascertained as *res judicata* the amount of the debt, and yet the statutory right to interest at 4 per cent. arises only upon so much of the judgment debt as consisted of principal under the contract which has been merged in judgment, and we will reopen the *res judicata* in order to split the judgment debt, and deprive part of it of the statutory incident of bearing interest at 4 per cent." The very point is ruled by Cotton, L.J., in *Fewings' Case* (1), for he says:—

> "It must be borne in mind that the creditor who obtains a judgment for principal and interest gets compound interest: his judgment carries interest at 4 per cent. upon the arrears of interest as well as upon the principal; it is not, therefore, a total loss of 1 per cent."

We cannot approbate and reprobate *Fewings' Case* (1), and we cannot give effect to it unless we insert in the order the full amount of principal due on the judgment, which is £19,443 7*s.* 9*d.*, and not £19,069 16*s.* 8*d.*, unless it can be shown that the larger amount has been since reduced by payment on account. Besides being small in amount, the point was not raised at the Rolls, and if amendment of the order be necessary, it cannot relieve the appellants from the costs of the appeal. I must observe, however, in conclusion, that this point suggests a more or less formidable question, namely, whether, when a judgment is obtained for an amount of principal and arrears of interest, upon which interest at 4 per cent. would be more than the amount of the interest on the original principal due at the contract rate, any excess

(1) 25 Ch. D. 338.

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can be recovered out of the security. In the case of a solvent mortgagor the question would be immaterial, because all his property would be available for payment of his debt; but between incumbrancers upon a deficient estate a question of priority might arise, of which I will only say at present that it does not arise here, because £19,443 7*s.* 9*d.* and 4 per cent. is less than £20,000 and 5 per cent.

The decision of this question is absolutely reserved. But speaking for myself alone, I have to observe that several of the cases arose between creditors. In every one of them, the amount of the judgment, with interest thereon at 4 per cent., was held to be recoverable under the charge, and the judgment had been recovered for some interest in addition to the original principal. No one who reads the authorities as I do, or who adopts the ground of decision which I have endeavoured to explain, can go behind the judgment to ascertain the amount which bears the statutory interest, or can treat the original contract as still effective, either to regulate the rate of interest or to ascertain the amount of the interest-bearing principal. All or nothing is *res judicata.* Unless we go back to the legal position of Bacon, V.-C., in *Fewings' Case* (1), we cannot treat the mortgage as still effective, to ascertain either principal or interest, and the decision that the mortgagee has lost the benefit of the contract for the purpose of fixing the rate of interest cannot stand with holding him still bound by the same contract, for the purpose of reducing the amount of the principal upon which the statute law has given him interest under the judgment in which the contract has been merged.

HOLMES, L.J.:—

The Limerick Market Trustees were incorporated by a local and personal Act in the year 1852, and were thereby authorised to borrow a sum not exceeding £30,000 on mortgage of their lands, works, rents, and tolls.

In exercise of the power thus conferred, they obtained from the National Bank two loans of £10,000 each, which were secured by two mortgages drawn in the form prescribed by the Act,

(1) 25 Ch. D. 338.

and dated the 22nd September, 1853, and the 3rd May, 1854, respectively, the interest reserved being 4½ per cent. in the earlier one, and 5 per cent. in the later. Some years afterwards the National Bank required to call in these sums; and it was arranged between the bank, the Market Trustees, and the Economic Life Assurance Society, that the latter should advance the amount, and take a transfer of the securities. This transaction was carried out (1) by two assignments of the original mortgages, dated the 17th November, 1858, and (2) by a deed, by way of further security, of the same date.

The Market Trustees are not parties to the assignments, which are drawn in the simplest form, and are transfers by the original mortgagees to the trustees of the Assurance Society of the mortgages described as No. 1 and No. 2, and all property thereby granted, and all moneys thereby secured. The deed of further security is a most elaborate instrument made between the Market Trustees of the one part and trustees for the Assurance Society of the other. It recites at unnecessary length the Act of 1852, what was done thereunder, the two loans of £10,000, the request for repayment by the National Bank, the application to the Assurance Society to advance the amount, and the agreement to do so, upon having a transfer of the existing securities with the further security thereby given. It then proceeds to re-mortgage all the property of the Market Trustees to secure the full sum of £20,000. In doing so, it departs entirely from the simple form contained in the schedule to the Act, and accumulates all the provisions of verbose conveyancing, to some of which it will be necessary to refer hereafter; but at present I need only mention that it provides for the payment of interest on the entire sum of £20,000, at the rate of 5 per cent., thus increasing the original rate of interest in the first mortgage of £10,000 by ten shillings.

In the year 1862, another local and personal Act was passed conferring upon the Market Trustees further borrowing powers, to the extent of £10,000, and certain loans were made in pursuance thereof.

The interest payable to the Assurance Society under the foregoing securities seems to have been regularly met, and it also

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appears that about £1000 of the principal was paid off; but I am unable to say at what time and under what circumstances.

For some reason, which has not been explained, and which, in the peculiar circumstances of the case it is difficult to understand, the Assurance Society, in the beginning of the year 1897, when less than half a year's interest was due, issued a writ of summons in the Queen's Bench Division to recover the full amount then due for principal and interest under the covenants contained in the deed of further security of 1858; and judgment was obtained in this action on the 12th April, 1897, for the sum of £19,443 7*s.* 9*d.*, and £11 3*s.* 6*d.* costs. This was followed by the appointment by the Queen's Bench Division, on the application of the Assurance Society, of a receiver, by way of equitable execution over the beneficial interest of the Market Trustees in the mortgaged property to the extent of and to answer in payment of the said judgment debt.

This order was obtained on the 9th September, 1897; and John Hardiman, the receiver thereby appointed, went into receipt of the rents, tolls, and customs of the Market Trustees, which were applied by him, subject to necessary outgoings, towards payment of the judgment debt to the exclusion of all other creditors.

This led to the commencement of the action now before the Court, the object of which was to have a receiver appointed by the Chancery Division for the benefit of all persons interested in the property of the Market Trustees, and to have it applied according to their respective rights and priorities.

It is unnecessary to state in detail the subsequent proceedings. It is enough to say that the Queen's Bench order of the 9th September, 1897, has been rescinded; and that a receiver appointed by the Master of the Rolls is now in possession.

The controversy which is the subject of the present appeal has arisen in relation to the application of the moneys coming into the hands of the Chancery receiver, and is confined to two points:— 1, whether the mortgagees under the Act of 1852, who are admittedly entitled to their interest in priority to the interest payable to mortgagees under the Act of 1862, are also entitled to have the principal due them fully paid before the mortgagees

under the later Act receive any interest; and, 2, whether the interest to which the Assurance Society is entitled is to be calculated at the rate of 4 or 5 per cent. The answer to the first of these questions seems to me to be comparatively easy. Where the ordinary owner of property conveys it by way of mortgage to two creditors in succession, the rights of the second mortgagee is in every respect puisne to those of the first. He cannot foreclose without redeeming the prior mortgage; and, if he sells, he only receives the surplus of the purchase-money after the earlier incumbrance has been paid in full. But a body like the Limerick Market Trustees, called into existence and incorporated by statute for the purpose of performing public duties, is not like an owner of private property. A reference to the preamble of the Act of 1852 shows that the Market Trustees were created to provide market accommodation for the inhabitants of the borough of Limerick as well as for persons resorting thereto, and that it was in furtherance of this object that the right to hold markets theretofore enjoyed by the municipal corporation of the city of Limerick was transferred to them, that they were authorised to acquire lands to be used as market-places, and that they were empowered to demand rents and tolls. Except in the manner and to the extent prescribed by the Act they had no power to borrow on the security of the property thus vested in them; and in construing the borrowing powers conferred by such a statute, little or no help can be gained by reference to the rights and remedies of ordinary mortgagees. For example, to empower the creditor to foreclose or sell would be inconsistent with the whole intention of the statute. Accordingly we find that the only remedy given to the mortgagees to enforce payment of their debts is by the appointment of a receiver either by proceedings in the Superior Courts or in the summary manner provided by the Commissioners Clauses Act, 1847.

The important section of the statute of 1852, for my present purpose, is the 52nd. It enacts that all moneys arising from the rent and tolls, and all moneys to be borrowed, and all other moneys which shall come to the hands of the trustees in any other way, shall be applied—first, in defraying certain charges incidental to the passing of the Act; secondly, in paying *interest* on the

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moneys to be borrowed; thirdly, in paying to the council of the borough one-third of the gross income of the trustees, such gross income to be computed after providing thereout for the aforesaid interest; fourthly, in paying salaries and in providing and maintaining the markets; and fifthly, in paying off the principal of the moneys to be borrowed.

In considering this section it must be remembered that the right to hold markets, with the tolls and customs incidental thereto, previously enjoyed by the council of the borough, had by earlier sections of the Act been transferred to the Market Trustees, and that it was reasonable that the council should receive some compensation for the loss thus sustained. This accounts for the provision directing payment to the council of one-third of the gross income; and that this was as much a charge upon the rents and tolls as the mortgages, is shown by the machinery provided in the following sections for ascertaining the amount payable each year in respect thereof, and by the concluding words of the 60th section, empowering the council in default of payment to have a receiver appointed in the same manner and to the same intents and purposes as a mortgagee under the Act. By the 16th section of the Limerick Markets Act of 1872 the council is given, in lieu of the third of the gross profits, an annual sum of £1400, the effect of which is to substitute in the 52nd section of the earlier statute a definite sum for the third of the gross receipts as the payment to be made next after the payment of interest on the mortgages.

There can, I think, be no doubt that the object of the 52nd section was to define the respective rights of the several persons interested in the moneys, that would come to the hands of the Market Trustees; and if this be so, it is clear that while the interest on the mortgages is to take priority to the charge of the council, whether such charge be a definite sum as it is now, or a sum to be ascertained as it was at first, the principal of the mortgage debts is postponed thereto. So far the legislation is clear. I come now to the Act of 1862, which confers on the Market Trustees the power to borrow the further sum of £10,000. The 10th section enacts that all mortgages and bonds granted by the Trustees under the authority of the Act of 1852 shall have

priority over all mortgages granted under the new powers then given, while the 4th section enacts that subject to this provision as to priority, the interest on the sum of £30,000 borrowed under the Act of 1852 and the interest on the sum of £10,000 then authorised shall be a first charge upon the tolls; and after the payment of the interest on such sums respectively, the trustees shall pay annually to the council one-third of their gross income to be computed in the manner provided by the Act of 1852. The only difficulty in construing these provisions is the apparent inconsistency between the terms of the 4th and 10th sections and the circumstance that the former is declared to be subject to the latter.

There is nothing in the Act of 1862 to displace the priority given by the previous Act to the charge of the borough council over the principal of the mortgages created thereunder; and yet it is certain that the interest on the second mortgages as well as on the first is to be paid in priority to any payment to the council. Under these circumstances, it appears to me that the reasonable and indeed only possible construction to be given to the 10th section is that it preserves the priority of interest over interest, and of principal over principal, while it leaves interest and principal to rank in the order given to them respectively by the other parts of the legislation.

The Act of 1852 gave a different priority to the interest of its mortgages from that given to their principal. The Act of 1862 did the same as regards its mortgages, and the effect of the 10th section is to declare priorities, having regard to this separation of interest from principal. This was the conclusion arrived at by the Master of the Rolls, and in this branch of the case I entirely concur with him.

The other point relates to the rate of interest payable to the Assurance Society. The Chief Clerk fixed it at 5 per cent., the rate reserved in the deed of further security of the 17th November, 1858; but the other mortgagees contend that, in consequence of the judgment obtained for the debt, the only rate that can now be allowed is 4 per cent., and the Master of the Rolls has adopted this view. The question, in my opinion, is a very difficult one; and yet, if it had been asked an Irish lawyer twenty years ago, he

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would probably have been surprised that it was a question at all. The Incumbered and Landed Estates Courts had at that time sold a large portion of the land in Ireland, and had distributed the greater part of the proceeds amongst incumbrancers. It was not unusual for a mortgagee to obtain a judgment for his mortgage debt; and yet I believe in settling the schedule of incumbrances he was allowed interest on his unpaid principal at the rate provided by the deed. The practice has never, as far as I am aware, been challenged, at least in a reported case; and probably before the recent decisions some plausible arguments could have been advanced in support of it. It is, however, unnecessary to consider them, as they are inconsistent with the decision in *Arbuthnot* v. *Bunsilall* (1), and with the reasoning of Fry, J., in *Popple* v. *Sylvester* (2), and of this Court in *Lowry* v. *Williams* (3).

The difficulty is in ascertaining with precision the principle laid down in these cases. It is not that the effect of a judgment obtained for a mortgage debt is to make it impossible in all cases for the mortgagees to recover out of the mortgaged premises a higher rate of interest than 4 per cent. Much might be said in favour of such a proposition, nor could the mortgagee complain, as it is by his own act, and presumably for his own interest, that he obtains the judgment. But if this were the rule of law *Popple* v. *Sylvester* (2) and *Lowry* v. *Williams* (3) would not have been decided as they were.

Of the five cases that have been referred to, I think that neither *In re The European Central Railway Company* (4) nor *Ex parte Fewings* (5) gives much assistance in determining the question under consideration. The former case was peculiar in this respect, that it was not contemplated either in the covenant or charge that any interest should be paid after a specified date, and the only interest recoverable after that date was by way of damages, and not by contract. This seems to be the *ratio decidendi*; and although there are some observations of Bramwell, L.J., of wider application, they were not, I think, necessary for the decision.

(1) 62 L. T. (N. S.) 234.
(2) 22 Ch. D. 98.
(3) [1895] 1 I. R. 274.
(4) 4 Ch. D. 33.
(5) 25 Ch. D. 338.

In *Ex parte Fewings* (1) the question related to the judgment debt alone, and was in no respect conversant with how much could be recovered out of the advowson which was the property mortgaged. The mortgagee sought to enforce the mortgage debt by writ of sequestration, based on the judgment; and the debtor, who had filed a liquidation petition and carried a composition, applied for an injunction to restrain proceedings under the sequestration. This was resisted, on the grounds that the mortgagee was not bound by the composition resolutions, which did not affect his charge on the mortgaged premises, by reason of the amount due to him not having been accurately set forth in the debtor's statement of affairs, and the inaccuracy was alleged to consist in calculating interest on the judgment debt at 4 per cent., instead of 5. It was argued that, notwithstanding the judgment, 5 per cent. was still payable under the express covenant in the mortgage deed; but it was held that the judgment had put an end altogether to the liability under the covenant. No question, however, was raised or discussed as to whether the charge on the mortgaged premises bore interest at the higher rate.

This was the point in *Popple* v. *Sylvester* (2), *Lowry* v. *Williams* (3), and *Arbuthnot* v. *Bunsilall* (4); and in the first two it was held that the higher rate of interest was payable out of the mortgaged premises, while in the third it was held that it was not.

At first I was disposed to think that the distinction turned upon whether there was to be found in the mortgage deed an express contract charging the mortgaged premises with such interest until the principal was fully paid. The ordinary proviso for redemption is silent as to the interest after the day specified therein, and subsequent interest is only provided for by the covenants that follow.

If the premises were conveyed to the mortgagee to hold until the principal sum, with interest for the same at a specified rate, be satisfied—the form to be found in the schedule to the Limerick Markets Act, 1852—there would be, I think, a contract charging the mortgaged premises with the specified rate of interest until

(1) 25 Ch. D. 338.
(2) 22 Ch. D. 98.
(3) [1895] 1 I. R. 274.
(4) 62 L. T. (N. S.) 234.

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payment of the loan, although it would not be a contract upon which a personal action would lie against the mortgagee.

I have carefully considered the language of the judgments in the three cases, and I can find nothing to show that they rest on or recognise this principle. On the contrary, what is looked for is what is called an independent covenant, upon which another personal action could be brought and another judgment obtained; and although I fail to see any real distinction between the covenants in *Arbuthnot* v. *Bunsilall* (1) and *Popple* v. *Sylvester* (2), I must assume, on the authority of *Lowry* v. *Williams* (3), that there is a distinction.

Applying the principle which I have deduced from those decisions to the present case, I can find no independent covenant here. The primary security for the £20,000 is the original mortgages kept alive by the assignment to the Assurance Society. They follow the form in the schedule to the statute to which I have already referred; and although, in my opinion, they contain a contract that there shall be no redemption till the principal and interest, at the rate of 4½ per cent. in one case and of 5 per cent. in the other, be satisfied, I am bound to hold that if a judgment for the principal sum had been obtained on the covenant to repay at the end of twelve months, the rate of interest charged on the premises would have been thereby reduced to 4 per cent.

The deed of further security deviates altogether from the prescribed form, and is in many respects inoperative as being *ultra vires*; but it is valid to the extent of making the rate of interest 5 per cent. on the full sum of £20,000. There is, however, no independent covenant, such as was sought for and supposed to be found in *Lowry* v. *Williams* (3); and, therefore, the interest charged on the mortgaged premises was reduced after the judgment to 4 per cent.

It remains for me to say a few words upon a matter glanced at by Mr. Ronan in his able argument. The amount of the judgment by including interest previously due may exceed sometimes by a large amount the original debt; and the stipulated rate of interest may be less than 4 per cent. Of course the larger amount

(1) 62 L. T. (N. S.) 234. (2) 22 Ch. D. 98. (3) [1895] 1 I. R. 274.

and the higher rate of interest is recoverable from the judgment debtor; but is it charged upon the mortgaged premises? If the mortgagee were the only incumbrancer and the only judgment creditor, it would be immaterial; but it would be a serious thing for a puisne incumbrancer who had taken a mortgage subject to a prior charge of £1000 with interest at the rate of £3 per cent. to find the charge increased to £1500 with interest at the rate of 4 per cent.

In the present case the priorities of mortgagees both as to interest and principal is settled by statute; and if the Limerick Market Trustees, like many other local authorities in this country, had been able to borrow on their first mortgages at 3 or 3½ per cent. the rights of the subsequent mortgagees under the statutory contract would be prejudiced by any increase of this rate of interest.

Bramwell, L.J, in the course of his judgment in *In re The European Central Railway Company* (1) says:—"The original debt is gone; *transit in rem judicatam;* a fresh debt is created with different consequences. The judgment is now the charge." But the point which I am considering was not for decision at the time; and I am not aware that it was necessary to decide it in that case at all, for it does not appear that there were either mortgagees or judgment creditors other than the Oriental Financial Corporation. It does not seem to have been present to the mind of the Lord Justice; and, as far as I can see, it did not arise and was not discussed in any of the other cases.

There is, I think, nothing anomalous in holding that while the mortgagee after obtaining a judgment cannot claim a higher rate of interest than 4 per cent. out of the mortgaged premises, he does not by his judgment become entitled to have as an incumbrance on the premises interest calculated at a rate in excess of that originally stipulated for or on a sum larger than the unpaid portion of the original principal. The accounts ordered to be taken by the Master of the Rolls seem to have been directed on this basis, for I have no reason to think that it is through inadvertence or a clerical error that he does set forth in his judgment as the sum

(1) 4 Ch. D. 33.

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upon which interest is to be calculated the unpaid principal and not the entire mortgage debt; and on this point I am not disposed to differ from him. At the same time, I feel that the whole subject, as it now stands, is puzzling; and I should be glad to see it definitely settled by a tribunal unfettered by previous decisions.

Solicitors for the plaintiff: *T. F. O'Connell & Son.*

Solicitors for the Economic Life Assurance Society: *Barrington & Son.*

Solicitor for the National Bank: *Dunne.*

G. Y. D.

DARLEY *v.* PERCEVAL AND OTHERS.

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Settlement—Construction—Life estate to husband and wife—Power of appointment—In default of, to children equally—Shares to be vested in and paid to them on attainment of age, or in the case of daughters on marriage—Payment deferred till death of parents—Unappointed residue—Death of son in parents' life-time, of age and intestate—Period of vesting—Absolute interest.

By indenture, dated the 16th April, 1844, certain trust funds were settled on the husband and wife for life, with power of appointment, and in default of appointment, in trust for the children equally, who being a son should attain twenty-one or die under that age leaving issue, or being a daughter should attain that age or marry; such shares to be vested in and paid to them, respectively, at the same age, day or time, if the same should happen after the decease of their parents; but if the same should happen in their lifetime, then immediately after the decease of the survivor. The settlement contained the usual hotchpot clause. There were two children of the marriage, a son and daughter. On the occasion of the daughter's marriage one moiety of the trust funds was appointed to her by her parents, and was settled on certain trusts by her marriage settlement. The parents likewise appointed a further portion of the trust funds in favour of the son, which, however, did not exhaust the whole. The son died in the lifetime of his parents, having attained age, unmarried, and intestate. One of the trustees of the settlement having taken out an originating summons to have the question determined, whether, on the construction of the settlement, an absolute interest in the unappointed residue became vested in the son on his attaining age, or whether the period of vesting was contingent on his surviving his parents:—

Held, that the postponement of enjoyment was solely for the convenience of the estate, there being nothing to show that the postponement was intended to depend on any event personal to the children themselves; that, consequently, the son, having attained age, had acquired an absolute interest in the unappointed residue, and that his personal representative was entitled to receive it.

By an indenture of settlement dated 16th April, 1844, which was executed on the marriage of Henry Shaw and Wilhelmina M'Mahon, certain trust funds, amounting in value to about £15,500, were put in settlement upon trust as to the sum of

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£5000 to pay the interest thereof to Henry Shaw for life, and after his decease during the lifetime of Wilhelmina M'Mahon upon trust to pay the interest thereof to her for life; and after her death in trust for the children as Henry Shaw and Wilhelmina M'Mahon, or the survivor of them, should by deed or will appoint; and in default of appointment in trust for the children who, being a son or sons should attain the age of twenty-one or die under that age leaving issue, or being a daughter or daughters should attain that age or marry, to be divided among them, if more than one, in equal shares as tenants in common; and if there should be but one child, the whole to be in trust for that child. There were also provisions for the maintenance and education of the children during minority. The settlement then contained the following clause:—"Such shares or share to be *vested in and paid to* him, her or them, respectively, at the same age, day or time, if the same shall happen after the decease of the said Henry Shaw and Wilhelmina M'Mahon; but if the same shall happen in the lifetime of the said Henry Shaw and Wilhelmina M'Mahon, or either of them, then immediately after the decease of the survivor of them the said Henry Shaw and Wilhelmina M'Mahon.

After the usual hotch-pot clause there was the following proviso:—"Provided always that if any such child or children being a younger son shall depart this life, or being a daughter shall depart this life before the share hereby intended for him, her or them, respectively, shall so become vested as aforesaid, then if no such direction or appointment shall be made by the said Henry Shaw and Wilhelmina M'Mahon, or the survivor of them, to the contrary, as well the share hereby originally provided for every such son so dying, and for every such daughter so dying, as the share or shares which by virtue of this present shall have survived or accrued to him, her or them, respectively, or so much thereof as shall not have been previously applied for his, her, or their preferment or advancement in the world by virtue and in pursuance of the power or authority hereinafter for that purpose contained, shall from time to time go, accrue, and belong to the survivors or survivor, and others and other of them the said children, and so far as circumstances shall admit, shall vest and be paid to him, her, or them, and if more than one in equal shares, at such time or

times, and in such manner as was hereinbefore declared concerning his, her or their, original portion or portions." As regards the remaining portion of the trust funds, it was directed that the same trusts should be applied to it as were declared concerning the above-mentioned sum of £5000.

There were two children of the marriage, Ponsonby M'Mahon Shaw and Charlotte Shaw, both of whom lived to attain the age of twenty-one.

By deed-poll dated the 25th July, 1868, the father and mother appointed one-half of the trust funds in favour of their daughter, on the occasion of her marriage with Charles William Perceval, and on the same day she executed a settlement assigning this portion of the trust funds, so appointed to her, to trustees on certain trusts. By a further deed of equal date the father and mother appointed a sum of £1200 in favour of their son Ponsonby M'Mahon Shaw. As no other appointment was made, a considerable balance of the trust funds comprised in the original settlement was thus left unappointed.

Ponsonby M'Mahon Shaw, the son, died on 6th November, 1869, during the life of his parents, intestate and unmarried. His father died on 6th September, 1886, and his mother on the 27th April, 1897.

The present case came before the Court on an originating summons, which was taken out by Henry Ponsonby Shaw Darley, one of the trustees of the original settlement, to have the question determined, whether, on the true construction of that instrument, Ponsonby M'Mahon Shaw took an absolute interest in the unappointed residue of the trust funds on attaining age, or whether, in consequence of his death in the lifetime of his parents, it became vested in his sister Mrs. Perceval; and, if so, whether it passed to her personally, or was captured by the terms of her marriage settlement, which did not contain an "after-acquired" property clause.

Herbert Shaw, for the plaintiff.

Law, Q.C., for the trustees of Mrs. Perceval's settlement:—

The whole question in the case is, whether Ponsonby M'Mahon Shaw on attaining age took an absolute interest in the

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unappointed residue of the trust funds; if not, we contend that it passed to the trustees of Mrs. Perceval's settlement.

When the words "vested in and paid to" come together, as here, the word "vested" must be read in its strictly legal sense. No doubt, in the case of wills the word "vest" has been held to imply indefeasibly or immediately payable, but that is not so in the case of deeds. Some light is thrown on the question by the clause relating to younger children. There the word "vest" is used alone, and the clause goes to show that a distinction was intended between the words "vested" and "paid." The Court strives to give effect to the intention, but it cannot vary the words of a settlement, even where the effect is to make the gift void for remoteness by the adoption of a strict interpretation of the word "vest": *Blakemore's Settlement* (1); *Morse's Settlement* (2); *Thatcher's Trusts* (3). The same rule applies to the case of a will: *Creeth* v. *Wilson* (4).

Assuming that the unappointed residue vested in Mrs. Perceval on the death of her brother, we submit that she does not take it personally, but that it is subject to the trusts of the settlement which she executed on her marriage. That settlement does not contain an "after-acquired" property clause; but the wording of the assignment clause is as follows:—"All that the one equal half, part, or share, or other equal part or share so appointed to her, as aforesaid, or to which she now is or hereafter may become entitled to, and in, all and singular the trust premises comprised in the said indenture of settlement of 16th April, 1844." These words are wide enough to capture after-acquired property.

Price, Q. C., for the personal representative of Ponsonby M'Mahon Shaw, and for Mrs. Perceval, personally:—

There is first a clear gift to the sons on attaining age, and to the daughters on attaining age or on marriage. Is that clear gift cut down by the subsequent clause? If the class is not ascertained until the death of the surviving parent, the clause relating to the younger children is mere surplusage. There are no negative words

(1) 20 Beav. 214.
(2) 21 Beav. 174.
(3) 26 Beav. 365.
(4) 9 L. R. Ir. 216.

in the clause to exclude the idea of vesting. "Vested in and paid to" means indefeasibly vested: *Wakefield* v. *Maffett* (1); *Leader's Estate* (2); *Baxter's Trusts* (3); *Taylor* v. *Frobisher* (4). Where a settlement is made by a person *in loco parentis*, a child is not deprived of his share by reason of his not surviving his parent, unless the words are clear and unambiguous. In the absence of such, the Court leans to the earliest period of vesting: Elphinstone on Deeds, 406. In *Morse's Settlement* (5), and *Thatcher's Trusts* (6), there was no gift on attainment of age or marriage. In *Creeth* v. *Wilson* (7) there were negative words of a positive character, qualifying the previous gift, and the period of vesting was deferred until the age of twenty-five was reached. Furthermore, the expression used was disjunctive. The unappointed residue is not captured by the clause in Mrs. Perceval's marriage settlement which only deals with what was appointed to her under the original settlement. Ponsonby M'Mahon Shaw having attained age took, as we submit, a vested interest in one-half of the trust funds which was consequently withdrawn from the trusts of that settlement.

Law, Q.C., in reply:—

The effect of Mr. Price's argument is to separate what is unquestionably one clause into two. In all the cases cited by him the meaning of the word "vest" was controlled by later words, but he has failed to point out any such words here.

March 27.

THE VICE-CHANCELLOR:—

This case comes before me on an originating summons to take the opinion of the Court upon the questions, whether in the events which have happened Charlotte Perceval in her personal capacity, or Fanny Croker, Richard Prendergast, and John Cathcart Lees, trustees of her marriage settlement, or Charles William Perceval, as administrator of Ponsonby M'Mahon Shaw, deceased, is or are entitled to the unappointed residue of certain trust funds comprised in the settlement of the 16th April, 1844. The summons

(1) 10 App. Cas. 422.
(2) 17 L. R. Ir. 279.
(3) 10 Jur. (N. S.) 845.
(4) 5 De G. & Sm. 191.
(5) 21 Beav. 174.
(6) 26 Beav. 365.
(7) 9 L. R. Ir. 216.

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has been framed in this alternative form, and has not been confined to the particular interest in dispute, upon which the trustees desire to take the opinion of the Court. The real question to be disposed of in the case is, whether the son who died in the lifetime of his parents took a vested interest in the fund. If he did not, the further question arises whether it is captured by the clause in the settlement made on the occasion of the daughter's marriage, assigning the trust fund to trustees.

The question arises on the construction of the settlement of the 16th April, 1844, by which a large sum of money was vested in trustees, of which a sum of £5000 was settled by it in a particular way; and then it was provided that the same trusts as were declared concerning this sum of £5000, were to be applied to the rest of the funds comprised in it. There were two children of the marriage, Charlotte Perceval, and Ponsonby M'Mahon Shaw, both of whom attained the age of twenty-one. In the year 1868, on the marriage of their daughter, the father and mother, under a power contained in the settlement of 1844, made an appointment by deed of the 25th July, 1868, of one moiety of the trust funds comprised in that settlement to the young lady; and contemporaneously with that she executed a settlement settling her appointed share on certain trusts. On the same day, the 25th July, 1868, a deed was executed which purported to be an appointment by the father and mother of a sum of £1200 to their son Ponsonby M'Mahon Shaw. He died on the 6th November, 1869, during the lifetime of his parents, unmarried and intestate. Henry Shaw, the father, died on the 6th September, 1886. His wife survived him, and did not die until the 27th April, 1897.

The first question raised by the trustees of the daughter's marriage settlement is as follows:—They contend that, on the true construction of the settlement of 1844, the son did not take a vested interest in the unappointed balance of the trust fund, but that it vested at his death in his sister Charlotte Perceval. On the other hand, it is claimed by the personal representative of Ponsonby M'Mahon Shaw, the son, as having vested in him on his attaining twenty-one.

The trusts on which the sum of £5000 was settled were as follows, viz. upon trust for the husband for life, and after his death

for the wife for life, and after her death in trust for the children of the marriage as the husband and wife or the survivor of them should by deed or will appoint; and in default of appointment in trust to be divided equally among the children, who being a son should attain the age of twenty-one or die under that age leaving issue, or being a daughter should attain that age or marry; and it contained provisions for the maintenance and education of the children during minority. Then comes the clause upon which the question arises, viz. "such shares or share to be vested in and paid to him, her or them, respectively, at the same age, day or time, if the same shall happen after the decease of the said Henry Shaw and Wilhelmina M'Mahon; but if the same shall happen in the lifetime of the said Henry Shaw and Wilhelmina M'Mahon, or either of them, then immediately after the decease of the survivor of them." A life interest is thus given to the parents, respectively, and after the death of the surviving parent the children are to take as the parents should appoint; and in default of appointment, share and share alike, such shares to be paid on their attaining twenty-one years or marriage, should the event happen after the death of their parents; but, if not, the payment is deferred till after the deaths of the parents. Some argument was addressed to me upon the clauses contained in the latter part of the settlement, but I do not think any assistance can be derived from them.

Now, in the first place, what is the meaning of the words "vested in" and "paid to"? It is clear to my mind, that in this case these words were intended to effect a postponement of enjoyment solely for the convenience of the estate, for there is nothing to show that the postponement was to depend on any event personal to the children themselves. The attainment of age or marriage is an event entirely personal to the children. It is quite plain that it was impossible for the children to be paid during the lifetime of their parents, because the parents had life interests. Then, on the death of the surviving parent, the clause I have read comes in, and directs them to be paid immediately on the determination of that event. Of course there are an indefinite number of cases on this subject, but it all comes round to this in the end, that it is the doctrine of this Court to accelerate, if possible, the period

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of vesting, unless there be something in the document to show an intention to postpone enjoyment, until the happening of some event personal to the parties interested themselves. The provision as to the attainment of age or marriage is not such a distinct indication of intention as to justify me in finding a distinction between the words "vest" and "payable." Several cases were cited, but I shall only refer to one. That was a case of *Creeth* v. *Wilson* (1), which was decided by me about eighteen years ago; but I do not think that it applies to the present. In that case there were negative words, directing that the child should not take on the happening of certain events which were personal to him, and moreover the gift was contingent on his attaining the age of twenty-five.

On the whole, after considering the case, I have come to the conclusion, that Ponsonby M'Mahon Shaw took the undisposed of balance of the trust funds absolutely, and I therefore declare that Charles William Perceval, his personal representative, is entitled to it as such.

Costs to be paid out of the portion of the funds in dispute.

Solicitors for the plaintiff: *Crozier & Son.*

Solicitors for the defendants: *Charles Wilson* and *Stephen Gordon.*

J. MAC M.

(1) 9 L. R. Ir. 216.

HALL *to* SUTTON.

V.-C. 1899. Dec. 19.

Taxation of costs—Solicitors' Remuneration Act, 1881—*General Order*, 1884 —*Building lease—Scale of charges.*

Lease for 700 years, at the yearly rent of £50, with a covenant on the part of the lessee to expend within five years the sum of £500 in building and effecting permanent improvements: buildings or improvements made with corrugated iron to be deemed permanent improvements; and also a covenant to keep the premises and improvements in repair, and a covenant to insure:—

Held, that such a lease was a building lease within the General Order, 1884, made under the Solicitors' Remuneration Act, 1881.

Summons to review Taxation.

By an indenture of lease made the 28th July, 1899, Captain John Hall demised to Abraham Sutton certain premises in Hartstonge-street, Limerick, for a term of 700 years from the 29th September, 1899, at the yearly rent of £50. The lease contained a covenant on the part of the lessee, within five years from the date thereof, to expend the sum of £500 "in building and effecting permanent improvements on said premises: buildings or improvements made with corrugated iron to be deemed permanent improvements." The lease also contained a covenant to keep the premises and improvements in good repair, and a covenant to insure the premises for a sum of £200, and for an additional sum of £500, when the sum of £500 should be expended pursuant to the above-mentioned covenant.

Mr. Sutton, who carried on the business of an extensive coal merchant, in his affidavit filed to support the summons, described the premises as follows:—"The premises consist of a small house value for about £20 a-year, two sheds, and a very large open yard. The fabric of the house, including roof and inside timber-work, is in fair order, and the only expenditure required is in the nature of ordinary repairs, including the dashing of the outside wall. One of the sheds is in good order, only requiring an outlay of about £10. The second shed is in very bad order, and I have no inten-

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tion of utilising it. It is my intention to expend the great bulk of the £500 in putting up two sheds of corrugated iron in the yard, but even after these are put up about two-thirds of the yard will remain open."

On taxation of costs the question arose as to whether the lease was to be deemed a building lease within the meaning of the Solicitors' Remuneration Act, and whether the scale of charges thereunder in the Order of 1884, Schedule I. part 2, relating to building leases, or other long leases not at a rack-rent, applied.

The Taxing Master ruled that the lease was to be considered a building lease, and taxed the fee payable to the solicitor accordingly.

Conner, Q.C., for the lessee:—

In order to ascertain whether the lease is a building lease, regard must be had to the facts of the case. Mr. Sutton is an extensive coal merchant, and his sole object in acquiring the premises is to carry on his business there. The covenant merely contemplates the erection of coal sheds; consequently the lease is not a building lease, but an improvement lease. The present case resembles *Hogan's Estate* (1), where a lease to a race committee with a covenant to expend £1000 on erecting a grand stand was held not to be a building lease. Moreover, the rent reserved is a rack-rent, and long leases held at a rack-rent are excluded from the operation of the Act.

D. F. Browne, for the lessor:—

This is clearly a building lease. Even assuming it were not a building lease, a repairing lease is equivalent to a building lease for the purposes of the Act: see *Hogan's Estate* (1). In the Landed Property Improvement Act, 1860, the Conveyancing Act, and the Settled Estates Act of 1858, repairing leases are included under building leases. Besides a covenant to keep the premises in repair, there is also a covenant to insure. It is likewise to be observed that the lessee is not in any way restricted as to the mode in which

(1) [1894] 1 I. R. 503.

the £500 is to be expended. The covenant merely declares that corrugated iron sheds shall be deemed to be permanent improvements.

Conner, Q.C., in reply.

THE VICE-CHANCELLOR affirmed the ruling of the Taxing Master.

Solicitors for the lessee; *Exham & Sons.*
Solicitors for the lessor: *Conolly & Co.*

J. MAC M.

IN THE MATTER OF THE ESTATE OF JOHN HARRISON, OWNER; EX PARTE PARDO ARCHIBALD KIRK, PETITIONER.

Landlord and tenant—Land Purchase Acts—Land Act, 1896, *sect.* 40—*Court tenant—Agricultural or pastoral holding—Portion of mansion house and demesne.*

Portion of the mansion house, yard, and offices of Hollywood House, together with 190 acres, of which 40 acres were ornamental plantation, was held by a Court tenant:—

Held, that it was not an agricultural or pastoral holding, and so was outside sect. 40 of the Land Law Act, 1896.

APPLICATION for a request to issue under section 40 of the Land Law (Ireland) Act, 1896; oral evidence was given by Mr. Watt, Captain Harrison, Mr. Clement Cordner, and Mr. Fox on behalf of the owner, Captain Harrison; and by Mr. Grainger, the Court tenant, and Alexander Huxley, on his behalf; and their evidence, so far as is material, is fully stated in the judgment.

Harrison, Q.C. (with him, *Whitaker*), for Captain Harrison:—

The question is whether the land forming portion of the Hollywood demesne is so clearly in its nature agricultural or pastoral, or

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partly agricultural and partly pastoral, as to entitle the Court tenant to have an offer made to him under the 40th section. To exclude it regard must be had to other circumstances than if a fair rent were sought to be fixed on it. 1. This land is potentially building ground, and so it ceases to be agricultural or pastoral. 2. Demesne land is excluded from section 40, and only included when it is in the hands of the owner. 3. The substantial part of the holding is excluded from the Land Acts. [The following cases were cited:—*Perry, Tenant*; *Farley, Landlord* (1); *Pratt, Tenant; Viscount Gormanstown, Landlord* (2); *Allen, Lessor*; *Grogan, Lessee* (3); *Crookshank* v. *Law* (4); *In re Owen's Trustees' Estate* (5); *Leonard* v. *St. Leger Barry* (6); *Butterly, Tenant*; *Carroll, Landlord* (7); *Wall, Tenant*; *Eyre, Landlord* (8).]

Hume, Q.C., and *M'Ilroy*, for the Court tenant:—

We are not bound to show that this is an agricultural farm or used as such: all we have to prove is that it is a parcel of land of an agricultural or pastoral character in the occupation of a Court tenant; and he is entitled to have an offer made to him. [The following cases were cited: *Price* v. *Robb* (9); *Nelson, Tenant*; *Headford, Landlord* (10); *Macartney, Grantor*; *Gordon, Grantee* (11); *Boyle, Tenant*; *Foster, Landlord* (12).]

Whitaker, in reply:—

The onus of proof lies on the tenant, which he has not discharged.

July 10. Ross, J.:—

In this case an application has been made for a request under the 40th section by some of the parties interested in the estate. It is contended on behalf of Grainger that the lands now in his occupation should be included in the request.

(1) [1894] 2 I. R. 579.
(2) [1894] 2 I. R. 279, 557.
(3) 32 L. R. Ir. 179.
(4) 27 I. L. T. R. 2.
(5) [1897] 1 I. R. 186, 265.
(6) Mac Devitt's R. 240.
(7) 26 L. R. Ir. 93.
(8) 32 L. R. Ir. 475.
(9) 17 Ir. L. T. 438.
(10) 18 L. R. Ir. 407.
(11) [1897] 2 I. R. 1.
(12) 30 L. R. Ir. 623.

He holds under a Court letting made the 15th April, 1899, for two and a-half years from the 1st November, 1898. The facts are not in dispute. What was known as Hollywood House and demesne was formerly occupied by Mr. Henry Harrison, a brother of Captain Harrison, the present tenant for life. The mansion house is suitable as a residence for a gentleman of position and property. It is surrounded by 190 acres of land, 40 of which are to the present time covered with ornamental timber. Mr. Henry Harrison lived there till the year 1870, when he was succeeded by his son Richard Harrison, who lived there for a short period. Then, Mr. Cordner the agent and trustee of the estate occupied the mansion house and demesne for a few years. A Mr. Bartley rented the mansion house and gardens for a short time, and during that time Mr. Cordner managed the land through a land steward. A small portion of the demesne was let in perpetuity to the Misses Ireland as a site for a villa residence. In 1894, the mansion house and gardens were let for seven years pending the matter to Colonel M'Calmont, M.P., and are still in his possession. The rest of the premises were let to Captain John Harrison for the same term. In Captain Harrison's holding were included the steward's house which is under the same roof as the mansion house, part of the yard of the mansion house, and the greater part of the offices thereto attached. It also contained the 40 acres of ornamental timber. In the spring of the present year Captain Harrison found himself unable to look after the lands in consequence of ill health. As he had some valuable crops in the ground, early cabbages and wheat, and as he had accumulated a large quantity of manure, he applied to the Court for liberty to make over his interest in the premises to a solvent tenant. This was granted, and the present tenant was the purchaser for a sum of £400. He entered into possession of what Captain Harrison had under an agreement of the 15th April, 1899. The tenant, as he admits, only wanted the use of the premises for two and a-half years from the 1st November, 1898, at the rent of £230 per annum. It has since occurred to him that he can get something more, namely, the advantage of an offer under section 40. The town is plainly extending in this direction; extensive infantry barracks have been built on land adjoining. The land will soon be of great

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value as sites for villas. The tenant, who gave his evidence very fairly, states that he wishes to become the owner of the property in the hope of afterwards disposing of it in building lots. The owner and incumbrancers contend that the application of section 40 to such a case would in any view of the matter be a monstrous injustice.

On the assumption that Hollywood House and demesne are to be used in the same way as in former years, nothing could be more absurd than that the occupant of part of the actual mansion house buildings, of the offices and part of the yard, should be allowed, by purchasing his portion, to destroy the value of the premises as a residence.

If it is the law that temporary tenants of parts of demesnes are in all cases to have the right of pre-emption, most unfortunate results will follow. Incumbrancers and owners will allow demesnes to lie derelict pending the sale, rather than allow persons into occupation, who may be able by asserting their right of pre-emption to render the mansion house and lands unsaleable. On the other hand, if these lands are not to be kept as an adjunct to the mansion house owing to their suitability as building sites, why should the incumbrancers and owner be prevented from developing their property in their own way to their own advantage?

It is settled by the decision of the Court of Appeal in *Owen's Estate* (1), that tenants under Court lettings are within the provisions of section 40—that the class described in sub-section 2 are included in that class of persons appearing to be in occupation as tenants, mentioned in sub-section 1. But the holdings must be agricultural, or partly agricultural and partly pastoral. I am of opinion that Mr. Grainger's holding is not agricultural or pastoral within the meaning of section 40. The words are identical with those used in the Act of 1870, section 71. The decisions on this section excluded certain agricultural lands where agriculture was not the predominant element in the holding. These decisions created a judicial exception. They rested not upon any express words in the Act, but were arrived at by considering its general scope and intention. It was established that lands, agricultural or

(1) [1897] 1 I. R. 265.

pastoral in fact, were not agricultural or pastoral within the meaning of the statute. With a full knowledge of these decisions the Legislature uses the same language in the Act of 1881, and in sect. 40 of the Act of 1896. Suppose that Hollywood House and demesne as it was occupied by Mr. Henry Harrison, were now the subject of the Court tenancy, would anybody dream of calling that an agricultural holding? The amount of land used for pasture and tillage would be very large, but it would not be an agricultural holding within the meaning of the Act. The tenant has not, however, got the whole of it. But he has the steward's house, that is actually part of the mansion house itself; he has the offices, the whole of one yard, and half of the other; and 40 acres occupied by a non-agricultural element, namely, ornamental timber. The steward cannot get from his house to the land except by walking over the part of the yard in the possession of Colonel M'Calmont.

It is contended that in this land, forming part of a residential establishment in the suburbs of a great city, temporarily let, we have an agricultural holding "used" according to the familiar cant of the Sub-Commission Court, "and tilled like an ordinary farm." One's common sense revolts at the proposition, even when presented, as it has been skilfully and plausibly, by the counsel for the tenant.

It becomes unnecessary for me to express any opinion upon the contentions of counsel for the parties having carriage, on the capability of the lands for building purposes, or on the fact that the letting consists partly of a non-agricultural element, the woods.

I therefore declare the holding to be outside the operation of the 40th section, and I order it to be excluded from the request.

I may add that if I had been coerced to hold that the holding was within the scope of section 40, in the exercise of my discretion in the interests of ordinary justice I would not allow the case to be taken out of its turn. I would, on the contrary, allow the matter to stand, pending the expiration of the temporary tenancy.

Solicitors for the landlord: *Hugh Wallace & Co.*
Solicitor for the tenant: *T. C. G. Mackintosh.*

W. C. S.

Ross, J.
1899.
Nov. 3.

In THE MATTER of THE ESTATE of WILLIAM STAWELL GARNETT, Owner and Petitioner.

Land Judge's Court—Receiver—Authority to give receipt for compensation, under £20, for land taken under Labourers Acts.

The Land Judge authorized the Receiver to give a receipt, under Schedule II., No. 19, of the Housing of the Working Classes Act, 1890, for money paid as compensation for land taken under the Labourers (Ireland) Acts.

Application by the District Council of Oldcastle Union that the Court should authorize the Receiver to give a receipt for the compensation money of certain lands over which he had been appointed, which the applicants had acquired under the Labourers (Ireland) Acts.

Jeffrey White, for the applicants:—

The question arises as to what course is to be adopted with regard to the compensation money, £12 10*s.*, which has been, by an order of the Court, provisionally placed to a separate credit: section 72 of the Lands Clauses Act, 1845, regulates the present case. The Receiver represents "the parties entitled to the rents and profits" within that section; or, if not, the latter portion of the section applies, viz. "in case of . . . other incapacity." The occupation of the owner has not ceased by the appointment of the Receiver: *Moir* v. *Blacker* (1). As to how the matter is to be carried out: section 3 (1) of the Labourers (Ireland) Act, 1896, incorporates the second schedule to the Housing of the Working Classes Act, 1890, No. 19 of which provides for the receipt for the compensation, duly stamped *ad valorem*, operating as a conveyance of the lands. The sanction of the Court to this is necessary: *Tink* v. *Rundle* (2).

(1) 26 L. R. Ir. 375. (2) 10 Beav. 318.

Ross, J. :—

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I am satisfied that this is an application which should be granted, and that the Receiver represents all the parties entitled. I shall order that the Receiver do give a receipt for the payment of the purchase-money in the form prescribed by the Housing of the Working Classes Act, such receipt to be prepared by and at the expense of the applicants, and to be duly stamped by them as provided by such Act.

Solicitor for the applicants: *John Clark.*

W. C. S.

IN THE MATTER OF THE TRUSTS OF A SUM OF £1100 BEQUEATHED BY THE WILL OF JOHN MURPHY, DECEASED, AND IN THE MATTER OF THE TRUSTEE ACT, 1893.

M. R. 1899. Jan. 31. Feb. 14.

(1898. No. 138.)

Trustee Act, 1893 (56 & 57 *Vict. c.* 53) *sect.* 42—*Payment into Court of legacy—Discretion of trustee.*

A testator directed his executors and trustees thereinafter named to invest a sum of £1100 and apply the income in payment to his son A of a weekly sum for maintenance, with a half-yearly allowance for clothes, until they should be of opinion that it would be prudent to pay him the principal, with a gift over in the event of A dying before receiving the principal. The income of the £1100 was applied as directed by the executor who proved the will, and after his death by his executors, who afterwards paid the principal into Court under the Trustee Act, 1893. A applied for payment out:—

Held, that the payment into Court deprived the executors of the executor of any discretion they had as to payment of the principal.

A having consented to the settlement of the fund for the benefit of his wife and children, the fund was ordered to be paid out to the trustees of a proper settlement, when appointed.

MOTION.

This was an application on behalf of John Murphy for transfer and payment by the Accountant-General to him of the sum of

M. R. 1899. *In re* MURPHY'S TRUSTS.

£914 11*s.* 2*d.* stock and £29 18*s.* 1*d.* cash in Court, standing to the credit in the title mentioned, or in the alternative for payment of the sum of £52 per annum, by quarterly instalments of £13 each, being an annuity at the rate of £1 per week bequeathed by the will of the above-named John Murphy to him, and that for that purpose the Accountant-General should from time to time sell so much of the said stock as was necessary to make up the said annuity; and for a declaration that the residue of the said stock should, on the death of the applicant, be transferred and paid to his executors, administrators, and assigns.

The facts of the case were as follows:—

John Murphy, by his will dated September 13, 1884, bequeathed to his executors and trustees thereinafter named the sum of £3400 Government New Three per Cent. Stock, upon trust to pay thereout (amongst other sums) the sum of £1100 sterling to his son John Murphy, when and as thereinafter directed. After disposing of the rest of the £3400 stock, the testator directed that the sum of £1100 sterling, as thereinbefore bequeathed to his said son John, be invested immediately after the testator's decease by his said trustees and executors in good and solvent security, such as trustees were by law empowered to invest trust funds, and from time to time apply the interest and dividends thereof in payment of the weekly sum of 16*s.* to his said son John for his maintenance, as also the half-yearly sum of £5 4*s.* for clothes, until his said trustees and executors were of opinion it would be prudent and proper to pay him the said principal sum of £1100; but should the said interest and dividends be at any time deficient to meet the said weekly and half-yearly payments to his said son John, the testator directed that such deficiency be made up from the said principal sum, and in the event of his said son John dying without having the said principal sum paid to him as aforesaid, the testator directed that said principal sum, or such part as remained unpaid, with all accumulations of interest (if any), should fall into and form part of his residuary estate, which he bequeathed for the benefit of other persons, and appointed his nephew, John Murphy (hereinafter called John Murphy the younger), and Laurence Malone his trustees and executors.

The testator died on May 2, 1888, and on May 29, 1888, his

will was proved by John Murphy the younger, the other executor, Laurence Malone, having renounced. John Murphy the younger died on March 27, 1895, having by his will, dated July 2, 1894, appointed James Murphy, William Robinson, and Laurence Mulligan his executors.

The weekly allowance of 16*s.* and the half-yearly allowance of £5 4*s.* were paid to the applicant by John Murphy the younger during his life, and after his death by his executors down to April 29, 1898. On May 16, 1898, the said executors transferred into Court, under the Trustee Act, 1893, the sum of £914 11*s.* 2*d.* Government 2¾ per Cent. Consols, as representing the said sum of £1100 bequeathed by the will of the testator, less a sum of £100 sold out by the said executors to make good the deficiency of income. In the affidavit made for the purpose of lodging the said sum in Court the said Laurence Malone stated that he and his co-trustees were of opinion that it would not be prudent or proper to pay over the trust fund to the applicant, who was a person of irregular habits, and had from time to time caused his co-executor, William Robinson, much annoyance and trouble, and that he and his co-executors desired to be freed from further responsibility in relation to the said trust fund, and, therefore, proposed to lodge the money in Court. On December 18, 1898, the applicant served the notice of motion above set out.

Gordon, Q.C., and *Corvan*, in support of the motion :—

The executors of the testator were given a discretion as to payment of the principal to the applicant, which was personal to them, and cannot now be exercised. The applicant is, therefore, entitled to have the fund paid out to him. The case comes within *Gough* v. *Bult* (1) and *Gude* v. *Worthington* (2). *Gude* v. *Worthington* (2) is distinguished in *Moorsom* v. *Tate* (3); but in that case the trustees had a discretion to apply the whole or part of the income or *corpus* for the benefit of the legatee, who died before the tenant for life, subject to whose interest a share of residue was given to the legatee, and it was held that the personal representative of the legatee was

(1) 16 Sim. 45. (2) 3 De G. & Sm. 389. (3) 60 L. J. Ch. 326.

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not entitled to the fund. [They also referred to *Gompertz* v. *Gompertz* (1), *Izod* v. *Izod* (2), and Godefroi on Trusts (p. 279).]

O'Connor, Q.C., for the residuary legatees of the testator:—

The discretion was exerciseable by the executors as such, and not merely by the particular executors named by the testator: it is doubtful whether, having paid the money into Court, they can exercise their discretion: *Re Landon's Trusts* (3), following *Joel* v. *Mills* (4), but see *Re Coe's Trusts* (5). If they can still exercise it, they have done so by the statements in their affidavit; if not, it is for the Court to exercise the discretion.

Gordon, Q.C., in reply.

Feb. 14.

THE MASTER OF THE ROLLS (after stating the facts set out, proceeded as follows):—

It is not necessary to decide whether the discretion conferred upon the trustees and executors is personal to those named in the will, or is carried on *virtute officii* to any persons afterwards clothed with that character. There is strong ground for holding that it was meant to be exercised by the trustees and executors "thereinafter named" alone, but I do not determine this. The payment into Court of this £1000, in my opinion, finally deprived the trustees of any discretion they might have had in the matter: *Re Williams* (6), *Re Coe's Trusts* (5), *Mulqueen's Trusts* (7). They have obtained a complete discharge from all responsibility in respect of the trust fund, and must be taken to have finally retired from the entire trusts. There is, no doubt, a case of *In re Landon's Trusts* (3). In that case, which is not reported elsewhere than in the Law Journal, a testator directed his trustees to set apart a sum of £1000, and either to pay the same to his son, or to apply it for his benefit, or to invest it and pay or apply the income thereof "for his benefit, or otherwise, as the trustees should in their uncontrolled discretion think fit." The trustees paid the money into Court, and stated in their affidavit

(1) 2 Phil. 107.
(2) 32 Beav. 242.
(3) 40 L. J. Ch. 370.
(4) 3 K. & J. 458.
(5) 4 K. & J. 199.
(6) 4 K. & J. 87.
(7) 7 L. R. Ir. 127.

that the testator's son had been adjudicated a bankrupt, and that they were desirous of exercising the discretion given to them. The assignees in bankruptcy of the son applied for payment out of the money. *Joel* v. *Mills* (1), *Re Coe's Trusts* (2), and *Re Wright's Trusts* (3) were cited.

The judgment is given in these terms:—

"The Master of the Rolls held, on the authority of *Joel* v. *Mills* (1), that the trustees had not lost their right to exercise the discretion given to them as to the first fund, and ordered that the costs of all parties up to the hearing should be paid out of the first sum, one set only being allowed to the creditors subsequently to the bankruptcy; and that the residue should be paid out to the trustees."

The judgment is very short, and expressly founded upon *Joel* v. *Mills* (1), a decision which does not apply, as it was a suit by trustees, and not a payment into Court under the Trustee Relief Act. In such a case, where the plaintiffs sue as trustees, they have not finally abandoned that position till relieved by a decree discharging them. In fact, their status is the basis of the suit. I cannot regard *Landon's Trusts* (4) as binding upon me.

In considering, then, how this discretion ought to be exercised, if the Court has to determine it, it is to be remembered that the petitioner is the primary object of the gift at least, and that the exercise of the discretion was meant to be for his benefit.

The testator does not say that his difficulty was occasioned by the habits of his son, but I think so much may be inferred. The £1100, however, is to be "paid to" John Murphy when and as directed. The only words of gift are in the direction to pay. Afterwards comes the direction to pay him 16*s*. per week and £5 4*s*. half-yearly for clothes, making together £52 per annum, or £1 per week, the deficiency to be made up out of capital. This was to go on until his "said trustees and executors" are of opinion it would be "prudent and proper" to pay him the £1100. If John Murphy should die before the legacy was paid it was to fall into the residue. No express provision is made for the event of his surviving the trustees, the legacy being unpaid, though it is obvious that after their deaths he might have become an eminently respectable character;

(1) 3 K. & J. 458.
(2) 4 K. & J. 199.
(3) 3 K. & J. 419.
(4) 40 L. J. Ch. 370.

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and yet there might be no one to exercise the discretion and pay him the money. Looking at the whole scope of this peculiar legacy, it seems to me that the testator meant it to be paid at some time to his son, but with power to withhold it temporarily for his benefit. The present trustees, one of whom is also a residuary legatee, do not I gather, consider the applicant to be a person of very exemplary conduct in one respect. He swears he is of regular and temperate habits. The word "temperate" is, perhaps, an elastic term. However that may be, I suggested, and he has agreed, that the fund shall be settled. He is a married man. It is nearly fifteen years since the date of his father's will, and eleven since he died. If his habits are not all that could be desired he is at least entitled to his £52 a year, and under the settlement he will not get more, while the *corpus* will be available for his family. I have no doubt this is more in accordance with what the testator intended than to pay him the £52 yearly, and leave his family without any provision, and also more calculated to benefit the legatee himself.

When a proper settlement is produced the money will be paid to the trustees, and I wish it to be understood that I assert no jurisdiction in an ordinary case to do this as the act of the Court. A payment out by the direction of a person to whom a fund belongs is in effect a payment to him. Here the Court must undertake the discretion in lieu of the trustees. If Mr. Murphy had not agreed to this course, the money would probably not have been paid out at all—at least at present.

Solicitors for John Murphy: *R. G. Pilkington & Co.*
Solicitors for the residuary legatees: *Murphy.*

W. L.

IN THE MATTER OF THE ESTATE OF THE TRUSTEES OF R. OWEN (No. 3) (1).

Appeal.
1899.
Jan. 15, 16,
Feb. 22.

Landlord and tenant—Land Purchase Acts—Redemption of jointure—Compulsory power, or discretion—Land Law (Ireland) Act, 1896, sect. 31.

An estate was sold in the Land Judge's Court in fourteen lots, four of which, Nos. 2, 3, 7 and 14, were charged with a jointure of £200 a year. By an order dated the 1st November, 1895, it was ordered that the lands should be sold discharged of the jointure, and that the jointress should have the same rights against the proceeds of the sale of the lands as she would have had against the lands. Lots 7 and 14 were sold under the ordinary jurisdiction of the Land Judge, and after the passing of the Land Law Act, 1896, lots 2 and 3 were sold under the 40th section of the Land Law Act, 1896, to the tenants. By order dated the 8th December, 1899, it was ordered that the jointure should be apportioned between lots 2 and 3 on the rental, and lots 7 and 14, and that the part so apportioned in respect of lots 2 and 3 should be redeemed:—

Held (by the Lord Chancellor, and Walker and Holmes, L.JJ., *dissentiente* FitzGibbon, L.J.), that the jointure was a "superior interest" within the meaning of sect. 31 of the Land Law Act, 1896, and that it was compulsory to redeem so much of it as was apportioned on the part sold to the tenants under the 40th section.

Alexander's Estate ([1900] 1 I. R. 20) approved of and followed (*dissentiente* Fitz Gibbon, L.J.).

BY an indenture of post-nuptial settlement dated the 7th October, 1870, made in pursuance of an ante-nuptial agreement, the lands of Bawnmore, Moneymore, Aghmacart and Addergoole (portion of which were held in fee, the rest being chattels real) were conveyed to trustees upon trust for Robert Owen, the husband, for life or until bankruptcy, and after his death to pay a jointure of £200 a-year to Mrs. Susan Owen, the wife, for life, in case she survived her husband, and subject thereto for the children and grandchildren, issue of the marriage. The settlement contained a power of leasing, a power to the trustees to sell the lands discharged of the trusts, and a power of investment.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1899. *In re* OWEN'S ESTATE. (No. 3.)

Robert Owen, died in the year 1882, and an action was brought in the Chancery Division (*Poe* v. *Short*) to administer his assets. In pursuance of a decree made in that action a petition for sale was filed in the Land Judge's Court for sale of his estate. By an order in the Land Judge's Court dated the 1st November, 1895, it was ordered that the lands should be sold discharged of the annuity payable to Mrs. Owen, and that the annuitant should have the same rights against the proceeds of the sale of the lands on which her annuity was charged as she would have had against the lands. Mrs. Owen consented to this order.

The estate was sold in fourteen lots, and Mrs. Owen's jointure affected lots 2, 3, 7, and 14. Lots 7 and 14 were sold under the ordinary jurisdiction of the Court of the Land Judge, and after the passing of the Land Law Act, 1896, lots 2 and 3 were sold under the 40th section of that Act to the tenants. On the 8th December, 1899, an order was made by Ross, J., directing that the jointure should be apportioned between lots 2 and 3 on the rental, sold to the tenants, and lots 7 and 14, and that the part so apportioned in respect of lots 2 and 3 should be redeemed at a sum to be ascertained according to the provisions of the statutes in that behalf. There was not any formal judgment pronounced by Mr. Justice Ross, who followed a similar ruling made by him in *Alexander's Estate* (1). From that order Mrs. Owen appealed.

O'Connor, *Q.C.*, and *M'Carthy Mahony*, for the appellant:—

We submit that Mrs. Owen's jointure is not a "superior interest" within the meaning of sect. 31 of the Act of 1896. It certainly is not a superior interest to the estate put in settlement; it is simply something carved out of it. There is no term of years to secure the jointure, but the settlement contained a power of sale, and the power of sale is superior to all the estates carved out of the fee. When the order was made to sell, discharged of the jointure, the jointure was part of the estate sold. Nothing can be a "superior interest" under section 31 which the Landed Estates Court was able to sell under its ordinary jurisdiction. Under the Landed

(1) [1900] 1 I. R. 20.

Estates Court Act, sections 44, 54, and 68, the Judge might sell subject to an annuity if he thought fit. Sect. 5 sub-sect. 9 of the Act of 1885, was the first section that made it compulsory to redeem head interests, but that applied only to proceedings carried out by vesting order. The powers of the Land Judge were extended by sect. 20 of the Land Law Act of 1891. But there is no section of any statute which makes it compulsory to redeem the annuity.

Ronan, Q.C., Jellett, Q.C. and *C. Brady*, for the respondents :—

The jointure is a "superior interest" within the meaning of sect. 31. Section 31 was the natural outcome of section 40. The Landed Estates Court Act, by sect. 54, gave the Court power to sell either subject to or discharged of an annuity or rentcharge. The powers of the Land Judge have been gradually extended by subsequent Acts. By sect. 16 of the Act of 1887, a discretionary power to redeem and apportion was given to the Land Commission. Then came sect. 20 of the Act of 1891, which gave them power over superior rents affecting the tithe rentcharge, or rent. The Land Judge had the same power as the Land Commission. But when the Act of 1896 was passed, the scope and object of the sales by the Court was greatly enlarged. Now the Court sells to the tenant the fee-simple free and unincumbered. Once the Court had to sell the fee to the tenants, then it was necessary to get rid of everything that binds the fee. The words of the section are "redeem or satisfy." Sub-sect. 8 defines superior interest, and the terms of it would include a jointure. We submit that it was compulsory to redeem the annuity, *Alexander's Estate* (1) ; if not, it was within the discretion of the Land Judge, and, having exercised his judicial discretion, this Court will not interfere.

LORD ASHBOURNE, C. :— Feb. 22.

This is an appeal from an order of Mr. Justice Ross, who ordered that the part of the jointure of Mrs. Susan A. Owen apportioned on certain lands sold under section 40 of the Act of 1896 should be redeemed out of the purchase-money.

(1) [1900] 1 I. R. 20.

Appeal. 1899. *In re* Owen's Estate. (No. 3.) Lord Ashbourne, C.

Mrs. Owen has appealed on the ground that her jointure is not a "superior interest" within the meaning of section 31 of the Act of 1896, and that, therefore, the Land Judge had no jurisdiction to make the order appealed from.

The jointure was created under a marriage settlement dated the 8th October, 1870. The lands charged with the jointure were sold in four lots, two by ordinary sales under the general jurisdiction of the Court, and two under section 40 already referred to. The question arises in reference to the two last mentioned lots.

Some reliance was attempted to be placed on an order dated the 1st November, 1895, by which the Land Judge directed that the lands should be sold discharged from the jointure, and that Mrs. Owen should have the same rights against the proceeds of the sale as she would have had against the lands themselves. But I do not think that this can at all relieve us from, or assist us in, determining the jurisdiction of the Land Judge under section 31 of the Act of 1896. The first sub-section of section 31 is in the following terms:—"Where any land has been sold under the Land Purchase Acts, as amended by this Act, or where land is sold by the Land Judge to the tenant thereof, and an advance under the Land Purchase Acts is made for the purpose of such sale, or where a lessor or grantor has signified his consent to the redemption of a rent under the Redemption of Rent (Ireland) Act, 1891, the sale of such land, or the redemption consequent on the lodgment of such consent, as the case may be, shall be made discharged from all superior interests as defined by this section or any of them, and in every such case the land shall be vested accordingly in the purchaser in fee simple, and such superior interests, or the value thereof, shall become a lien upon, and be redeemed or satisfied out of, the purchase-money of such land."

It is essential in the first place to note that this section applies to all operations under the Land Purchase Acts, as amended by the Act of 1896, whether by the Land Commission or by the Land Judge, and therefore it is desirable to bear in mind what were the powers of the Land Commission in the way of apportionment and redemption before the passing of the Act of 1896. They were extremely large and wide, and had been steadily increased. Considerable jurisdiction in reference to the subject was conferred by

the Purchase Act of 1885, commonly called "the Ashbourne Act," but the Act of 1887 made substantial developments. The 16th section of the Act of 1887 gave new and increased powers of apportioning annuities and rentcharges, and of transferring the charges to the purchase-money, the Land Commission being given full power to act "if they thought fit." The 3rd sub-section provides:—"The Land Commission shall, on the application of the person entitled to a part of an annuity, rentcharge, or rent, which part shall have been apportioned by them upon land sold, and may, if they think it expedient, without such application, order the redemption of such annuity, rentcharge, or rent, or of an apportioned part thereof, and may, notwithstanding the fact that no apportionment has been made, order the redemption of any annuity, rentcharge, or rent affecting land sold." Further facilities were given by the Purchase Act of 1891, and it will thus be seen that before the passing of the Act of 1896 the Land Commission had great powers for the apportionment and redemption of annuities and charges, whether their owners liked it or not. But in order to smooth and develop the system of land purchase it was deemed desirable, in addition to annuities, rents, and rentcharges, to give the power to redeem "fees, duties, or services, payable or to be rendered, in respect of the land sold, to any person, including Her Majesty and Her successors, and any estates, exceptions, reservations, covenants, conditions or agreements, contained in any fee-farm grant, or other conveyance in fee, or lease, under which such land is held." All these interests, together with the rents, rentcharges, and annuities already dealt with in the 16th section of the Act of 1887, are included in the expression "superior interest" as defined by the section. I take it to be manifest that the jointure in the present case clearly came within the 16th section of the Act of 1887, and I am unable to see how it can possibly be excluded from the "superior interests" of section 31 of the Act of 1896, which was not used in any technical sense, but as defined by the section, and was directly intended to include them together with new interests in a convenient new expression. This construction is rendered, to my mind, irresistible, when I find that section 16 is not only unrepealed, but given fresh express vitality in two sub-sections of this 31st section. This 31st section

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conferred the same powers on the Land Judge as on the Land Commission, and if I am right in holding that the latter had full power to deal with this jointure as a "superior interest," so of course had the Land Judge. In consequence of the new power conferred on the Land Judge to make sales to tenants under the Land Purchase Acts, and under section 40 of the Act of 1896, it was doubtless deemed right to give him all the powers of apportionment and redemption which were, or had been, conferred on the Land Commission. In this connection it is important to note the terms of the 4th sub-section of the 31st section:—"Where a holding is sold by the Land Judge to the tenant thereof, and an advance under the Land Purchase Acts is made for the purpose, the Land Judge shall have the powers of apportionment and redemption conferred on the Land Commission by sections 15 and 16 of the Land Law (Ireland) Act, 1887, and by section 20 of the Purchase of Land (Ireland) Act, 1891, as the same are amended and extended by this Act in like manner as if the Land Judge were the Land Commission." It is worthy of note that section 33 of the Act of 1896 gives a new and wider application to sections 15 and 16 of the Act of 1887, and extends their scope to any contingent liability for any annuity, rentcharge, or rent. I am therefore of opinion that the redemption of the jointure in this case was quite within the jurisdiction of the Land Judge, and that it comes within the definition "superior interests" in section 31. This was the point really argued before us by the appellant, but I desire to add a few words on the general construction of the section. It is not disputed that the Land Judge had a clear discretionary power to make the order for the redemption of the portion of the amount in question, but it is denied that the making of the order was at all compulsory upon him. I consider that the section had strongly and directly in view the vesting of the fee of the holding he purchased in the tenant. This both the Land Commission and the Land Judge must steadily regard, and they are clearly bound, when possible, to apportion and redeem all "superior interests" necessary to effectuate that object. Speaking generally, I think the first sub-section of the section to be compulsory, but I do not regard it to be necessary to discuss, for the purposes of this case, how far any discretion may conceivably be exercised under it

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by the Land Commission or the Land Judge. They cannot be expected to order redemption when it is practically impossible. It is also urged that some of the language of the sub-section indicates a desire to vest some power of discrimination. Thus it is enacted that the land shall be discharged from all superior interests "or from any of them." Then whilst there is no doubt that the superior interests or the value thereof shall become a lien upon the purchase money, it is said that they shall be "redeemed or satisfied" out of the purchase-money, that is, as may be decided, having regard to their character and circumstances, some being susceptible of redemption in the ordinary sense, while others can only be dealt with by compensation or satisfaction. The statement of the 3rd sub-section that its power shall be exercised "in such manner as shall appear equitable," and the conferring in the 4th sub-section of the powers of the 16th sub-section of the Act of 1887 on the Land Judge, go to show that the 31st section of the Act, taken as a whole, whilst compulsory in important particulars, was steadily preserving a discretion, at all events, for some purposes.

But, however this may be, I am of opinion that the jointure in this case was a "superior interest" as defined by the section, that Mr. Justice Ross' order was right, and this appeal should be dismissed with costs.

FITZ GIBBON, L.J. :—

As regards property, the amount involved in this appeal is small. The appellant is entitled under her marriage settlement to a jointure of £200, which was charged on lands sold in the matter. It is admitted that if that jointure be apportioned, so much of it as may be allotted to the lands which have been sold according to the ordinary course of the Land Judge's Court, must remain charged upon the purchase-money of those lands, and that portion of the purchase-money must be retained to meet it. It is further admitted that the residue which may be apportioned against the lands which have been sold to tenants under the Act of 1896, sect. 40, must be redeemed at a fair price, ascertained according to the course of the Court. But the jointress objects to this, and seeks to retain her rights against all the purchase-money, because she prefers the modest provision of £200 per annum, which her husband made for

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her during her life, to taking a capital sum, which would expose her to the risk of penury in her old age, in the event of her life being extended beyond the average period upon which an actuary would calculate the value of her jointure. The question is not whether she is entitled to get a fair price for her jointure; it is whether she can, or ought to, be compelled to sell it. Two questions have been argued—firstly, Is there jurisdiction to compel her to sell? secondly, If there be such jurisdiction, does the Act of 1896, sect. 31, make it compulsory on the Court to exercise it, or is it discretionary only?

Before discussing these questions I must clearly state what they do not involve. I am satisfied that wherever the paramount object of the Act of 1896, sect. 40—the sale of holdings in fee to occupying tenants—is involved, the Act provides the means and confers the jurisdiction of acquiring every interest which stands between the Court and the fee simple. During the argument I stated, and I hold, that if this jointure stood in the way of a sale under sect. 40, it would be a "superior interest" within the meaning of sect. 31, and it might be acquired, and, if necessary, it might be apportioned or redeemed, for the purpose of enabling the Court to sell the fee to the tenants. The efficiency of the Act for that purpose is, therefore, in no way involved.

Mr. O'Connor informed us that in making the order appealed from, Ross, J. considered himself bound by his own decision in *Alexander's Estate* (1). He, therefore, gave no detailed judgment in this case, and we must refer to *Alexander's Estate* (1) for the questions which we have now to decide. The first question, to which Mr. O'Connor chiefly devoted himself, is whether Mrs. Owen's jointure is a "superior interest" which the Land Judge has jurisdiction to redeem under the Act of 1896? On referring to *Alexander's Estate* (1), it will be seen that this question arose there under circumstances essentially different from those which exist here. The lands sold there were subject to a life annuity of £100, and Ross, J. held that this annuity was a "superior interest." I entertain no doubt that he was right. Here, on the contrary, the lands have been sold discharged of Mrs. Owen's jointure—in other

(1) [1900] 1 I. R. 20.

words, the lands sold include the jointure. In my opinion a jointure when so sold is no longer a "superior interest."

But in *Alexander's Estate* (1) Ross, J. decided a second question—namely, that he was *compulsorily bound* to redeem the annuity; and in this case also he has held that he has no discretion as to the redemption of Mrs. Owen's jointure, and this is the second question which we have now to consider. I shall consider it in two aspects —first, Is the redemption compulsory under the general effect of the statutes governing the exercise of the Land Judge's jurisdiction?—secondly, Has not the Land Judge a discretionary alternative to redemption under the words of the Act of 1896, sect. 31, itself? If Ross, J. was wrong in holding that redemption was compulsory upon him, I hold that we ought not to consider the question of discretion, because the Land Judge has not yet considered it; and, if he has not the exclusive jurisdiction, he alone has the full materials for deciding it. If he has the discretion, the case ought to go back to him. For that reason it seems to me to be impossible for us to dismiss this appeal, unless we decide that the jurisdiction is compulsory, and a judgment which leaves the question of compulsion open can not be complete.

If the discretion exists, convenience, economy, and the like, ought to be considered. In a case such as this, where apportionment would be necessary, and where some of the purchase-money must in any event be retained to meet part of the jointure, the delay complication and expense of apportionment and redemption ought to be weighed against the value of the result of only cutting up a terminable annual payment, leaving part of it to run its course, and forcing the jointress to accept a capital sum as the price of the rest. In the present case, the jointure was charged on only three lots and part of a fourth, out of sixteen which have been sold. Two lots only have been sold under sect. 40. We do not know the relative amounts of the apportioned parts, and the inconveniences and difficulties of apportionment and redemption seem to be exceptionally great. But they are as nothing to the general inconveniences of an indiscriminate decision that, in every case in which an estate or a lot has been sold, which comprises even a single

(1) [1900] 1 I. R. 20.

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holding sold under sect. 40, the Judge has no discretion, and every charge must be apportioned and redeemed, and the purchase-money also must be cut up, regardless of difficulty expense and delay, and of the amount of advantage to be derived from the operation.

But inconveniences, however great, are, again, as nothing to the effects of the compulsory construction upon rights of property. While compulsory redemption may inflict loss upon those who are redeemed, it may be ruinous to owners and incumbrancers. The estates to be sold under sect. 40 have been well described as "waterlogged." Many of them must be subject to terminable annual charges; in many cases the only chance of safety for those whose interests are in peril will be to let these charges run their course, and to postpone the distribution of the purchase-money until they have come to an end. The application of the purchase-money to the immediate and compulsory redemption of such charges must, in multitudes of cases, mean the sacrifice of puisne interests, whether of owners and incumbrancers. I refer to this only to show that the question of discretion is a question of vital importance, and I repeat that in this case it has not been considered by the Land Judge, and that we have neither the means nor the primary jurisdiction to consider it.

The question whether Mrs. Owen's jointure is a "superior interest" within the Act of 1896 must be decided upon the circumstances of this case. By order of November 1, 1895, on the application of the owner and petitioner, and with Mrs. Owen's concurrence, an order was made that the lands should be sold discharged of the jointure, and that the jointress "should have the same rights against the proceeds of the sale of the lands on which her jointure was charged as she would have had against the said lands." The effect of this order, which was made under the Landed Estates Court Act, was to include the jointure in the sale, and to transfer all the rights of the jointress from the lands to the purchase-money. Before the sale, she could look to all or any part of the lands, and after the sale she could look to all and every part of the purchase-money, for payment of her jointure. The settlement conveyed the whole estate to trustees to secure the jointure, which was further secured by powers of distress and entry. In

Nicholson's Estate (1) the duty of the Court to secure the purchase-money, and to apply the income and capital in payment of the jointure, is laid down by Flanagan, J., after ascertaining the practice as well as the law of his Court. He could find no case to the contrary, nor could he understand on what principle such could exist. The order of November 1, 1895, completely removed the jointure, and the estate of the trustees, out of the way of the Court in proceeding to sell the fee. From that time forth Mrs. Owen's rights were wholly immaterial to the power of selling the fee, whether to tenants under the subsequent Act of 1896, sect. 40, or otherwise.

I repeat, therefore, that the policy or purpose of the Act of 1896 of facilitating the sale of the fee to tenants, cannot be affected by any decision of this case. Were it otherwise, I should hold that the power to redeem would exist, because the jointure would be within the definition of a "superior interest," and might be redeemed, and it would be, as Mr. Ronan said, "a perfectly plain case upon a perfectly plain section." But *cessante ratione cessat lex.*

My opinion is that when an interest is included in the estate sold, as this jointure was on November 1, 1895, it ceases to be a "superior interest" within either the words, the meaning, or the policy, of the Act of 1896. "Superior" must mean above something else, and the only thing to which the interests within sect. 31 can be "superior" appears to me to be the estate which is sold.

Sect. 31 (1) shows the object of the legislation. It says—"Where *any land has been sold* under the Land Purchase Acts the sale shall be made discharged from all superior interests as defined by this section, and *the land* shall be vested *accordingly* in the purchaser in fee-simple."

Sub-sect. (8) defines superior interest as *including* "any rentcharge payable *in respect of the land sold*, and any estates contained in any conveyance or lease under which *such land* is held." I cannot read these words as making a rentcharge, which has itself been included in "the land sold," "superior" to itself, or "superior" to that of which it forms an integral part. Sub-sect. (1) also says —"*Such superior interests*, or the value thereof, shall *become a lien*

(1) I. R. 11 Eq. 177.

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upon the purchase-money of such land." I have heard no answer to Mr. O'Connor's question, "How can the rentcharge, which is itself part of the land sold, be a *lien* on the purchase-money of that land?"

The Act of 1896 leaves untouched the provisions of the Landed Estates Court Act, under which the order of November 1, 1895, directed that Mrs. Owen should "have the same rights against the proceeds of the sale as she would have had against the lands," and this order both furnishes an additional proof that the jointure is no longer a "superior interest" in the land, and confers a right against the purchase-money of which the Act of 1896 confers no power to deprive her. For these reasons I answer the first question in favour of the appellant.

In considering the second question, I must assume, contrary to my opinion on the first question, that the jointure is a "superior interest," and is redeemable as such. The second question is, whether the Land Judge is compelled to redeem it, or whether he has any discretion to leave it outstanding as a charge upon the purchase-money? I consider this question, first, upon the general construction and effect of the Act of 1896.

So far as I have been able to ascertain, apart from the Act of 1896, neither the Land Purchase Acts nor the Landed Estates Court Acts imposed any compulsory obligation upon the Court to apportion or redeem charges, except for the purpose of facilitating sales. When Mrs. Owen allowed her jointure to be included in the sale by the order of November 1, 1895, nothing further could be done to facilitate the sale, and *Nicholson's Estate* (1) shows that her right to look to the purchase-money in place of the land became absolute.

The closing sentence of sect. 31 alone is relied upon as having deprived her of this right, and as forcing the Court to redeem her jointure. This sentence appears to me to have been added in the interest of the owners of the "superior interests." It immediately follows the words "shall be vested accordingly in the purchaser in fee simple." This is the object of the section. The concluding words are for the protection, so far as possible, of those whose

(1) I. R. 11 Eq. 177.

interests have been compulsorily acquired for the purpose of enabling the Court to vest the fee-simple in the purchasing tenants. It is immaterial to that purpose how the "superior interests" are dealt with in disposing of the proceeds of the sale. The first enactment is positive, universal, and compulsory. "Such superior interests, or the value thereof, shall *become a lien* upon the purchase-money." This enactment is analogous to the provisions of the Landed Estates Court Act, and of the Land Purchase Acts, and to the law of the Court laid down in *Nicholson's Estate* (1), which transfer charges upon land that has been sold to the money which represents that land. In the prior Acts and practice I can find no instance in which the owner of a charge upon purchase-money could be compulsorily deprived of that charge, and far less any instance in which the Court was deprived of the jurisdiction, or even relieved from the duty, of considering the rights of the chargeants before disposing of purchase-money which had taken the place of land sold. The same observation appears to me to apply to the "lien" to which the owners of "superior interests" are declared entitled by the Act of 1896.

The Landed Estates Court is not a Court of Bankruptcy; its jurisdiction is not that conferred by the Winding-up Acts; it is analogous in jurisdiction and duties to the Court of Chancery in the administration of estates, and its duty is to carry out that administration, and to manage the property committed to its charge, in the manner most beneficial to all parties concerned. By making the "superior interests or the value thereof" a lien upon the purchase-money, the Act of 1896 indicates the preservation, and not the compulsory determination, of the interests to which those words refer.

The consideration of the remaining words of sect. 31 (1), which I have not yet quoted, seems to me to put the existence of a discretion *not* to redeem beyond doubt. The whole sentence is this, "such superior interests or the value thereof *shall* become a lien upon *and* be redeemed *or* be satisfied out of the purchase-money of such lands."

There is a double obligation, of which the second part is an

(1) I. R. 11 Eq. 177.

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alternative. The word *shall* occurs but once, and imposes both obligations by the same mandatory word. The interest becomes by the Act a lien, and the Court must either redeem it or satisfy it. But it has the alternative to do *either* the one *or* the other. Grammatically, it is impossible to limit "redeem" to one class of cases, and to apply "satisfy" to another class of cases. Every superior interest, or its value, is equally included in the right to become a lien, and in the alternative right to be either redeemed or satisfied.

In *Alexander's Estate* (1) Ross, J. yielded to the argument of Mr. Oulton, that "superior interests" included "covenants, conditions, &c.," and that the word "redeemed" was not properly applicable to these. The section makes no such distinction, for it applies both words to all the superior interests. Nor is the distinction sustainable. The words "shall be a lien," which undoubtedly apply to everything included in the term "superior interests" is no more properly applicable "to covenants, conditions, &c.," than are the words "redeemed" or "satisfied"; and the word "satisfied" is quite as "properly applicable" to "rent and other money payable" as is the word "redeemed"; and there is nothing which is capable of being "redeemed" which is not equally capable of being "satisfied."

Ross, J. admitted, and it is clear, that "satisfaction" of a money payment, such as an annuity or a jointure, would include the continuance of its payment as it fell due, out of purchase-money retained to meet it, and this is all that Mrs. Owen asks. It is clear to me that, under the very words of sect. 31 (1), Ross, J. had the jurisdiction to do as she asked, and if so redemption cannot be compulsory. The compulsory construction, in short, ignores the existence of the alternative which the section expressly gives.

This brings me to the last observations which I feel it my duty to make. Arguments *ab impossibili* or *ad absurdum* are legitimate to fortify, rather than to found, a construction of a statute. Mr. Mahony forcibly applied these arguments. He showed that there are many charges which cannot be "redeemed," that there are few, if any, which cannot be "satisfied." This applies especially to money charges, and above all to annual terminable charges, such as Mrs. Owen's jointure.

(1) [1900] 1 I. R. 20.

Holmes, L.J., gave the unanswerable instance of an estate settled upon a father-in-law for life, with a jointure for a daughter-in-law to follow. The purchase-money must certainly be retained for the tenant for life, and during his life the jointure cannot be redeemed. It does not require to be "satisfied" until it becomes payable. But such instances may be indefinitely multiplied. Jointures are frequently limited *durante viduitate*. So long as the husband lives there is nothing to satisfy; if the husband be dead, must the Court value the widow's chances of re-marriage, for the purpose of redeeming a charge which can be paid out of the purchase-money until she marries again, and which will then cease? A pin-money allowance restrained from anticipation cannot be redeemed, because the redemption-money would represent its capital value, and the suggestion that the value might be placed in the hands of trustees would only transfer to them the insoluble problem of ascertaining how long the coverture was to last, because the amount to be annually paid to the wife should be measured, not by the interest on the redemption-money, but by the proportion of principal and interest, which together would represent the sum which she ought to receive from year to year during her husband's life. It is only piling Pelion upon Ossa to suggest the further complications presented by the common case in which a married woman is entitled to a pin-money allowance restrained from anticipation, to be followed by a jointure, for life or *durante viduitate*, in the event of her surviving her husband. Add to all this the ruinous consequences to owners and incumbrancers of forced redemption of life-charges held by persons in failing health, or terminable on uncertain events, or arising only on contingencies, and it will be seen that the results of the compulsory construction immensely strengthen the opposite construction, which leaves to the Court the discretion *either* to redeem *or* to satisfy every superior interest which falls within sect. 31 (1).

In this instance I acquit the framers of the Act of 1896 of the consequences of the compulsory construction which is now sought to be put upon section 31, which, for the reasons I have given, I believe to be unwarranted by either the words or the policy of the Act, and to be as mischievous in its consequences as it is impracticable in its operation.

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In this case the estate of Robert Owen was ordered by the Master of the Rolls to be sold for payment of debts, and the sale, as usual in such cases, was directed to be carried out through the Landed Estates Court.

The estate was divided into lots, of which it is sufficient to mention only four—2, 3, 7, and 14. All four are subject to a jointure annuity of £200 per annum, charged on the estate under the provisions of a settlement of October, 1870, and payable out of the lands in priority to Robert Owen's interest. Lots 2 and 3 are freehold and fee-simple, and within the provisions of the 40th section of the Land Act of 1896: 7 and 14 are chattel interests.

On the 1st November, 1895, an order was made that the lands should be sold discharged of annuities, but that the annuitants should have the same rights against the proceeds of the lands sold. The sale proved abortive. The Land Act of 1896 became law. The 40th section was applied; and lots 2 and 3 have been sold under the Land Purchase Acts. The sale has been made within the very words of sect. 31: "where any land has been sold under the Land Purchase Acts as amended by this Act," and the sale has been made discharged of the jointure annuity; and the question before us is whether there should be an apportionment of the annuity as regards lots 2 and 3, and the apportioned amount redeemed out of the purchase-money, or whether the annuitant retains her rights against the proceeds of the sales, thus preventing the distribution of the surplus funds. The appellant contends that this annuity is not a superior interest within the meaning of the 31st section of the Land Act of 1896, and, at all events, that the section is satisfied by leaving the proceeds of sale subject to the rights of the annuitant, as the order of November 1, 1895, directed, especially as this result necessarily followed in the case of lots 7 and 14, which were sold in the ordinary course, and not under the 40th section.

The question depends on the true construction of the 31st and 33rd sections of the Act of 1896 taken in connexion with the 40th. I think they contemplate compulsory sale—compulsory sale discharged of all defined superior interests (including annuities), and

also in the specified cases compulsory clearance of the purchase-money from such defined superior interests or their equivalent. This will best appear by tracing the several steps in what appears to be a legislation progressive up to its final development in sect. 31 and the cognate sections.

The first provision is to be found in the Landed Estates Act, by sect. 54 of which it has been enacted that "when the Judge *shall think fit*, such sale, conveyance, or declaration *may* be made subject to any annual charge affecting the land or part thereof sold, or to any such apportioned part of such annual charge as the Judge may think fit should remain charged thereon." Sect. 62 provides that a conveyance is not to prejudice any tithe rentcharge crown-rent, quit-rent, or drainage-charge, "save when the Court shall think fit to redeem or apportion the crown-rent, or quit-rent, or any part thereof, or to pay off or redeem these charges under the power hereinafter contained." By sect. 68 the Court may apportion crown-rent (with consent of the Department)—"It shall also be lawful for the Court to sell any land or part thereof discharged from any crown-rent or quit-rent which it may be enabled, and may with consent of the owner think fit to purchase, or from any drainage-charge which it may with such consent think fit to pay off or redeem," and it is made lawful "to pay to any person entitled to any annual or other charge, not being an incumbrance, according to the definition of this Act, *who may consent to accept the same*, a gross sum in discharge or by way of redemption thereof."

It may charge the part not sold with an apportioned part, and it may provide for the investment of money to meet any annual or periodical charge. By sect. 72 the Court may apportion rent on leases. By sect. 40 of the Land Act of 1870 on a sale to tenants, "the Court shall have full power to apportion charges, rents, and covenants." By the Act of 1885 when the sale is carried out through the Land Commission, and it is agreed that it shall be carried into effect by vesting order, the Land Commission are given the powers which the Landed Estates Court possessed under the sections mentioned, and by sect. 9, sub-sect. 9, a vesting order *may* be made, whether or not the holding, either solely or in common with other lands, is subject to any

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incumbrance or annual charge, and the rights and claims are transferred to the purchase-money.

The Act of 1887 made a further advance in sections 15 and 16. Section 15 provides for the apportionment, with the previous consent of the Departments, of crown-rent, quit-rent, tithe rent-charge, land improvement charge, or drainage-charge, and for the redemption of such at a price to be fixed by the Land Commission. The Land Commission may require persons entitled to part of an incumbrance to accept a money advance in part discharge, and they may by order declare the land sold to be discharged of all incumbrances. Section 16 deals with *annuities and rentcharges*, and provides for apportionment and redemption at a price agreed upon, which price is to be determined by the Land Commission. When the parties consent they shall fix the price by agreement, and if they cannot, then there is power to refer to arbitration. But all these provisions are prefaced by the words, "*may if they think expedient.*"

Section 20 of the Act of 1891 gave them powers over the redemption-money, and made sect. 16 apply to a superior rent affecting the tithe rentcharge, or rent.

The Act of 1896 starts a new policy. By sect. 40 a compulsory sale is to be made under certain conditions to tenants, and the sale to them is to be free and unincumbered—a sale in fee simple. The main object is to get rid of insolvent estates and charges on such. With this object all previous discretion is taken away; the words, "may, if they think expedient," are dropped; even Crown charges are put in the same position—the consent of the Department to redemption is no longer required, and a new subject, Crown reversions, is added to the others. Annuities and jointures are put in the same category, and there seems no reason why they should be differently dealt with. The purchase-money, so far as it exists, is made distributable.

In the first place what is the language of sect. 31? [The Lord Justice read the section.] The word "shall" runs through it all —shall be vested in fee-simple, superior interests shall be redeemed or satisfied. The words "shall be a lien upon" only convey that the purchase-money shall not be parted with without providing for the redemption-money. Is this jointure annuity a "superior

interest"? Whether in the abstract some annuity may or may not be a superior interest may raise difficulties, but what we have to consider is whether it is one as defined by the section. Beyond a doubt it is "payable in respect of the lands sold," and it seems to me therefore a "superior interest" within the definition. But there are other defined "superior interests" which, from their nature, cannot be redeemed in the ordinary sense. They must be commuted, and compensation given for them. These include estates, exceptions, reservations, covenants, conditions, or agreements; on those a value is to be put, and if they are of no appreciable value they may be disregarded, and by sub-section 5 "the purchase-money of the land may be distributed without regard to such superior interest." The word "satisfied" in the 1st sub-section and the word "compensation" in the 5th sub-section are properly applicable to such. Thus we have a legislation dealing with what is capable of having a money price put upon it and what is not.

A question might arise, and was raised in argument as to whether the purpose of the legislation was satisfied once the fee was vested in the tenant by the sale to him discharged of the liabilities. This is met by sect. 33 (1). [The Lord Justice read the section.] The purchase-money in nearly all cases comes from the State, and not the buyer, who is not troubled with the charges. The advance lodged by the Land Commission remains to be dealt with, and to this advance all the redemption provisions are made applicable. A contingent annuity must be redeemed like others, and sub-section 4 strongly illustrates the same policy. By it where an annuity is payable in respect of the lands sold, but the lands have a right of indemnity against other lands, the purchase-money once and for all discharges the annuity by a redemption sum, and the person whose purchase-money has paid it is put in the place of the annuitant (by a supposed purchase) in order to enable him to assert the right of indemnity. This shows how far the policy of clearing the purchase-money extends. I do not think the order of 1st November, 1895, interferes with the application of the Act of 1896. When that order was made a sale under the then state of the law was contemplated. The sale became abortive; and afterwards the 40th section of the Act of 1896 became applicable, and was applied to the lots 2 and 3.

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Lots 7 and 14 were sold in the ordinary course; they could not be sold under sect. 31. Lots 2 and 3 were and must be dealt with as under it. It will constantly happen that some lots cannot be sold under sects. 31 and 40, but those that are must be dealt with under those sections. If the annuitant has different rights as against 7 and 14 under the order of 1895, they must be worked out. That cannot prevent the application of the provisions of sect. 31 which I consider compulsory in all its parts—the latter half as well as the first half.

There may be some cases in which the rights to the redemption price of an annuity are not absolute, but these will not prevent a price being fixed for the annuity. The purchase-money will all the same be free from it, and the rights of parties, *inter se*, to the fixed price will be worked out.

I do not consider that Judge Ross had any discretion in the matter. If he had, and exercised it, we should not interfere with his order, but I am of opinion he was bound in law to make the order which he did, and that the appeal should be dismissed.

I will only add that if the jurisdiction was discretionary, I think we should exercise it here by directing a redemption of the annuity.

Holmes, L.J.:—

A portion of the lands ordered to be sold in this matter was subject to a jointure rentcharge or annuity for the life of Susan Alice Owen, granted to her by the marriage settlement of the 8th October, 1870, under which the owner and petitioner derived his title. It was open to the Land Judge, in the exercise of the jurisdiction conferred on him by the Landed Estates Court Act, to sell either subject to, or discharged from, this annuity; and, accordingly, by order dated the 1st November, 1895, he directed that the lands should be sold so discharged, and that the annuitant should have the same rights against the proceeds of the sale as she would have had against the lands themselves.

Subsequently the lands charged with the annuity were sold in four lots; and there is no doubt that the annuitant would now be entitled to have retained in Court so much of the purchase-money as would secure to her the payment of the annuity as it falls due,

unless her rights under the order of the 1st November, 1895, have been altered by something that has since happened. The owner and petitioner contends that the rights of the annuitant have been altered by the Land Law (Ireland) Act, 1896, which became law before the lands were sold; and the question to be decided by the Court is whether this statute has the effect thus ascribed to it.

The 31st section thereof provides that "where any land has been sold under the Land Purchase Acts, as amended by this Act, or where land is sold by the Land Judge to the tenant thereof, the sale of such land shall be made discharged from all superior interests, as defined by this section, or from any of them; and in every such case the land shall be vested accordingly in the purchaser in fee simple, and such superior interests, or the value thereof, shall be a lien upon and be redeemed or satisfied out of the purchase-money of such land."

Two of the four lots, comprising the lands charged with the annuity, were sold by the Land Judge to the tenants thereof; and it is argued that the section I have quoted, when taken in connection with the provisions that follow, imposes a duty upon the Land Judge, first, to apportion the annuity between the proceeds of the sale of these lots and the proceeds of the sale of the two other lots, which were sold in the ordinary course of the Court; and then to redeem out of the moneys produced by the sale to the tenants so much of the annuity as in such apportionment would be charged thereon.

The Act of 1896 is one of a series of statutes relating to the purchase of lands by tenants with money provided in whole or in part by the National Exchequer; and the intention and object of the 31st section will be made more clear by a reference to some other portions of the code.

The Purchase of Land (Ireland) Act, 1885, which was the first effective attempt to enable tenants, with the aid of a State advance, to buy their holdings, contemplated that such purchase might be carried out either by means of an ordinary conveyance or by a vesting order of the Land Commission. In proceeding by vesting order the Land Commission was given, by the 8th, 9th, and 10th sections of the Act, much of the jurisdiction and many of the powers which are exercised by the Land Judge under the

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Landed Estates Court Act; and several of the most important sections thereof were incorporated with the Act of 1885.

Although the effect of this legislation was to enable the Land Commission to vest in the tenant his holding freed from the rights and claims of all persons in respect of the estate sold, or any incumbrance or annual charge thereon, and to transfer the same from the land to the purchase-money, it was soon found in practice that if land-purchase by tenants were to be carried out on an extensive scale, it would be necessary to confer on the Land Commission more extensive powers than those possessed by the Land Judge. In particular, the authority of the latter to apportion annual charges and outgoings between different parcels of the land subject thereto, or to redeem out of the purchase-money an annual charge, whether apportioned or not, was, except with consent, very limited, being confined, as far as I am aware, to the cases mentioned in the 68th and 72nd sections of the Landed Estates Court Act.

The inducement to a landlord to sell to his tenant is, that he may receive some ready money at an early period; but if, after the guarantee deposit is provided, the remainder of the price is to be retained in Court to defray from time to time the rents, rentcharges, and annuities to which his estate is subject, it would be more prudent for him not to part with the land. To meet this difficulty, it was provided by the Land Law (Ireland) Act, 1887, sect. 16, sub-sect. (1), that when any land sold under the Land Purchase Acts is subject with other lands to any annuity or rentcharge, the Land Commission may, if they think it expedient, by order, apportion the same as between such land and the other lands subject thereto, and thereupon such part of the annuity or rentcharge as is apportioned on the land to be sold shall alone be deemed to be the annuity or rentcharge chargeable thereon.

The second sub-section provides that when the power of apportionment thus given is exercised, or when a rent is apportioned in exercise of the power conferred on the Land Commission by the 72nd section of the Landed Estates Court Act, as extended by the 10th section of the Purchase of Land (Ireland) Act, 1885, then the part of the annuity, rentcharge, or rent, which is apportioned upon any land sold, shall cease to be a charge thereon, and shall be transferred to the purchase-money thereof. Sub-sect. 3, while giving the person

entitled to the part of an annuity, rentcharge, or rent thus apportioned on the land sold, a right on application to have it redeemed out of the purchase-money, empowers the Land Commission, if they think it expedient without such application, to order the redemption of such annuity, rentcharge, or rent, or of an apportioned part thereof, at a price to be fixed in the manner prescribed in the sub-section.

The effect of these provisions is to give the Land Commission where land is sold to a tenant under the Purchase Acts, plenary powers to apportion any annuity, rentcharge, or rent to which the land sold is subject, and to redeem either the whole annuity, rentcharge, or rent, or the apportioned part of it out of the purchase money; and these powers can be exercised at the discretion of the Land Commission not merely without the consent, but against the will, of the persons interested. Nor can it be said that there is any exceptional grievance in these enactments. It is no doubt a hardship that a person should be obliged by the provisions of a statute to sell property which belongs to him; but legislation of this kind is very common, and it is not considered an injustice when means are supplied for ensuring him a proper price.

Such was the state of the law at the time of the passing of the Land Law (Ireland) Act 1896, the 40th section of which imposed a duty on the Land Judge to carry out, by means of the machinery of his Court, sales to tenants under the Land Purchase Acts on a very extensive scale. Up to that period he had none of the jurisdiction to apportion and redeem conferred on the Land Commission by the 16th section of the Act of 1887; and it would have been difficult, if not impossible, for him to perform his new duties unless he was given the same powers and facilities as were enjoyed by the other tribunal entrusted with similar duties. This seems to have been one of the objects of the 31st section, part of which I have already quoted. A further object was to extend the power of redemption to other interests. Accordingly the section is made to apply to superior interests as defined thereby; and the definition includes in addition to a rent, rentcharge, and annuity (as to which the power to redeem already existed in the Land Commission), fees, duties, or services payable or to be rendered in respect of the land sold, and estates, exceptions, reservations,

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covenants, conditions or agreements contained in any fee-farm grant, or conveyance in fee or lease under which such land is held, and also any reversion or estate expectant on the determination of certain kinds of leases. It is difficult to conceive a more extensive definition, and I fail to understand how it can be argued that Mrs. Owen's annuity or jointure rentcharge is not a superior interest within the meaning of the section. The argument of her counsel, however, before Mr. Justice Ross, and in this Court was confined to this single question. Mr. O'Connor opened the appeal by saying that the real point involved was whether his client's annuity was a superior interest as defined, and beyond this he did not go, in either his original argument or his reply. Mr. Mahony who followed took the same line, and although he pointed out the difficulty that might occasionally arise in the redemption of an annuity, he did so for the sole purpose of inferring that a life annuity was not a superior interest.

The contention is that a superior interest within the section must be paramount to all other interests and be of the same duration as the estate in fee simple sold to the tenant. But where is such a limitation to be found in the words of the definition? In the 16th section of the Act of 1887, the words "annuity, rentcharge, and rent" occur without any reference to "superior interests." What reason can there be for saying that in that section they are confined to paramount and perpetual charges? But if this be so, can a different meaning be given to the same words when they occur in the definition clause of the 31st section?

It is, in my opinion, unnecessary to go beyond the language used by the legislature, than which nothing could be clearer; but if anything more indicative of intention is required, it is to be found in section 33, sub-section 3, which enacts that sections 15 and 16 of the Act of 1887 shall apply to a contingent liability for any annuity, rentcharge, or rent in like manner as they apply to the annuity, rentcharge, or rent itself. It would be very singular legislation to give a power to redeem an annuity or rentcharge which at the time of redemption was not payable and which might never become payable, and to withhold the power of redemption in the case of a vested annuity or rentcharge, merely because it was

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to determine at some future time. For these reasons, I am of opinion that Mrs. Owen's annuity is a superior interest as defined.

Having come to this conclusion, I have some doubt as to whether I ought to go any farther. I have decided the point argued by the appellant; and although the respondents' counsel were led by observations of the Court, for some of which I am myself responsible, to discuss whether the Land Judge was given a discretion in reference to redemption, this view was never presented on behalf of Mrs. Owen. I presume that there was a good reason for this. If the Land Judge has a discretionary power to order the redemption of a life annuity, whatever he may do in a different state of circumstances, there can hardly be a doubt that he would exercise it in the present case. The capitalized value of a life annuity is calculated every day. The two lots sold to tenants comprise by far the most valuable portion of the lands on which Mrs. Owen's annuity is charged, and in the apportionment which could be carried out without difficulty, the greater part of it would be placed thereon. It is the first incumbrance, and subject thereto the proceeds of the sale are payable to an equitable mortgagee and to the simple contract creditors of the late owner, many of whom would probably be dead before the fund is distributed, if there be no redemption.

I have ascertained that since the passing of the Act of 1887 the Land Commission has generally, if not invariably, exercised the discretion thereby reposed in it by apportioning and redeeming life annuities charged on lands sold to tenants under the Land Purchase Acts, where the sale is carried out by vesting order, unless in cases where all the parties agree that there should be no redemption. Such cases have been very few, and it is certain that the general practice has been to apportion and redeem. There is no better test of how judicial discretion ought to be exercised than the mode in which the tribunal intrusted with the discretion has been in the habit of exercising it. It is for a litigant who desires that the course and practice of the Court be departed from to give reasons for dealing exceptionally with his case. But so far from counsel for the annuitant doing so in the present case, he could not be induced to say a word on the subject. It is true that Mr. Justice Ross, having come to the conclusion that he had no discretion, did not consider the matter; but this Court is at liberty to do so on the

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hearing of this appeal; and speaking for myself I should not hesitate to hold that the annuity ought to be redeemed. At the same time I am prepared to say that in my opinion the redemption of this annuity is not discretionary. The language of the 31st section is in marked contrast to that of the previous legislation which enabled the Land Commission to order the redemption of annuities and rentcharges if they thought it expedient so to do. The words are—"Such superior interests or the value thereof shall be a lien upon and be redeemed or satisfied out of the purchase money." Of course the lien here spoken of is a lien according to the priority of the interest, and the redemption or satisfaction must be out of the money properly applicable thereto. It may be that there is no such money, in which case there can be neither redemption nor satisfaction, but subject to this observation the clause is mandatory. It is suggested that the words "redeemed" or "satisfied" describe alternative methods, and that in the case of an annuity, rent, or rentcharge "satisfied" means that payments are to be made from time to time as a gale falls due.

This is not only an unnatural construction of the sentence, but if it was the intention, the mode in which it is here expressed is in striking contrast to the manner in which a similar intention is declared in other portions of the same code, as, for example, in the last part of the 9th section of the Act of 1885, which provides that the right of all persons in respect of an annual charge shall be transferred to the purchase money. The meaning of "satisfied" becomes clear when the whole clause is read together. What is to be redeemed or satisfied is the superior interests or *the value thereof*. The value of an annuity or rentcharge is its capitalized value, and the redemption of an annuity or the satisfaction of its value would be precisely the same thing. But there is no such redundancy in the sentence. To some of the "superior interests" enumerated in the definition clause the word "redemption" is appropriate; to others such as covenants, conditions, or agreements it is not. The value of the latter is to be ascertained, and when ascertained is to be satisfied. But whether it be redemption or satisfaction it is to be effected by the payment of a bulk sum.

I am not impressed with the argument that there may be cases of superior interests which it would be impossible to redeem. A

statute cannot compel the doing of what is impossible, and if there be such cases the section does not apply to them. I am not aware, however, that such cases exist. An annuity payable to a married woman restrained from anticipation, and an annuity to a widow, *durante viduitate*, have been mentioned. But in the former case there is necessarily a trustee to whom the redemption money would be paid, and whose duty it would be to apply it to the payment of the annuity as it falls due, and if the annuitant lives so long as to exhaust the fund she is only in the same position as an incumbrancer, having an inadequate security, a fate which, I regret to say, often befalls the owner of an annuity charged on lands. In the latter case it is not more difficult to value an annuity terminable on marriage than to value a contingent liability to an annuity which is certainly contemplated by the Act. In point of fact, life annuities of every kind have been redeemed by the Land Commission, and neither in the redemption nor in the preliminary apportionment has any difficulty been found, however singular or exceptional the case may be. There is an instance well known in consequence of some curious incidents connected with it in which an annuity charged in favour of Lady Verner by her husband's will on the family estates of £1200, reducible to £600 in the event of her marriage, was redeemed. One of the most recent cases of redemption was that of an annuity given to a maiden lady determinable on her marriage.

It has been asked what would happen if the annuity were *puisne* to an estate in the lands for a life. The answer is that if the life estate were not itself a superior interest, and therefore not redeemable, there would be no money to redeem or pay the annuity until the termination of the life estate.

I have not considered it necessary to examine in detail the elaborate provisions of the 31st and two following sections, which are ancillary to the direction to redeem or satisfy the value of superior interests with which the 31st section begins; but it is impossible to read them without being struck with the great care that has been taken to provide adequate machinery for carrying out, and to remove obstacles in the way of carrying out, the cardinal object of this portion of the statute.

For these reasons, therefore—first, because Mr. Justice Ross

Appeal. 1899.

In re OWEN'S ESTATE. (No. 3.)

Holmes, L.J.

was bound by the statute to make the order to redeem, and secondly, even if the statute is not mandatory, he ought, in the exercise of a sound judicial discretion, to have made it—I hold that the appeal ought to be dismissed.

Solicitors for the appellant: *O'Keeffe & Lynch.*
Solicitors having carriage: *Baker & Ringwood.*

R. D. M.

M. R. 1898.

July 1, 2, 6, 13.

Appeal. 1899.

Nov. 4, 27.

LYNCH *v.* CLARKIN.

(1898. No. 94.)

Interlineation and alteration in a deed—Presumption—Evidence—Recovery by tenant in tail—Declaration of uses—Resulting use.

When uses are declared upon a recovery by a tenant in tail, which do not exhaust the fee, the use so far as unexhausted results to the recoveror.

Tanner v. *Radford* (6 Sim. 21), explained and followed.

By settlement dated 29th October, 1800, executed on the marriage of P. L. and J. L., the lands of B. were granted to trustees to the use of P. L. for life with remainder to the use of the first and every other son of the marriage in tail male with remainders (as was held by the Court) to the heirs male of J. L., T. L., and P. L. (uncles of the husband).

In 1833, C. L., the eldest son then living of P. L. and J. L. married, and two deeds were then executed, both dated the 10th June, 1833. By the first of these, after reciting that C. L. was desirous of barring the entail and acquiring the fee for the purposes thereinafter mentioned, P. L. and C. L. granted the lands to G. for the joint lives of P. L. and G. to the intent that the said G. might become tenant of the freehold of the said lands in order that a recovery might be suffered. It was thereby declared that after judgment should have been obtained and seisin taken upon such recovery, the lands should enure to W. J. and P. J. in fee-simple for the uses of the settlement of equal date and for no other uses or purposes whatsoever.

By the settlement of equal date, the lands were conveyed to W. J. and P. J. in fee simple, to the use of C. L. for life, with remainder in tail male, with divers remainders over, but the settlement did not contain any ultimate limitation of the fee. It declared the uses of the recovery to be that the estate tail of C. L. and all reversions and remainders over might be barred, and that after judgment upon the recovery the lands should enure to W. J. and P. J. for ever for the uses and trusts thereinbefore expressed, and for no other use, intent, or purpose, whatsoever. A recovery was duly suffered.

C. L. died in 1897, without issue, and all the other remainders under the settlement of 1833 failed. The plaintiff as heir of one of the remaindermen in

the settlement of 29th October, 1800, brought an action against the devisees under the will of C. L., claiming to be entitled on the ground that as there was no limitation of the fee contained in the settlement of 10th June, 1833, the recovery only barred the entail for the purposes of the settlement, leaving a resulting use in favour of the prior settlement :—

Held by the Court of Appeal (affirming the decision of Porter, M.R.), that the estate tail was barred absolutely, and the ultimate use in fee resulted to C. L.

TRIAL OF ACTION.

The plaintiff claimed to have it declared that he was entitled as tenant in tail male in possession to certain lands known as Ballycurren Castle House and demesne, etc., in the barony of Kilmain and county of Mayo, and the island of Inchiquin, in the barony of Clare and county of Galway; and all other, if any, the lands, tenements, and hereditaments comprised in a certain indenture of settlement dated the 29th October, 1800.

The first two paragraphs of the statement of claim were as follows :—

1. In and prior to the year 1800, Henry Lynch was in possession of the lands and premises, the subject of this action.

2. By settlement dated the 29th October, 1800, made between Henry Lynch, Margaret Lynch, his wife, and Peter Lynch, described as his heir apparent of the first part; Margaret Lynch, otherwise French, widow and sole executrix of Charles Lynch, and her daughter Julia Lynch, spinster, of the second part; George Browne and Patrick Lynch of the third part; and John D'Arcy and Louis Wingfield M'Carthy of the fourth part, the said Henry Lynch in consideration of the intended marriage between said Peter Lynch and Julia Lynch, granted the said premises to George Browne and Patrick Lynch, their heirs and assigns, to hold the same to the uses by said deed declared, and amongst others, to the use of his son Peter for life, with remainder to the use of the first son of the said Peter Lynch and Julia Lynch, and the heirs male of the body of such son; remainder to the second, third, fourth, fifth, sixth, and other sons of the said Peter Lynch, successively, severally, and in remainder one after another in priority of birth and seniority of age, and the respective heirs male of his and their body and bodies. The said settlement has been greatly mutilated and defaced at some time since its execution.

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The plaintiff believes and avers that after the limitations aforesaid the said lands and premises are thereby further limited successively to the heirs male of the bodies of John Lynch, Thomas Lynch, and Peter Lynch (brothers of the said Henry Lynch) and the respective heirs male of his and their body and bodies.

The deed of 1800 when produced in Court contained both an interlineation and erasure, the former of which the Master of the Rolls held was made before, and the latter after, execution: and after examination of the deed and hearing expert evidence as regards the same, he came to the conclusion that the deed of 1800, after the estates in tail male to the sons of Peter Lynch, contained, when executed, this further limitation:—"Then to the use and behoof of John Lynch (1), Thomas Lynch, and Peter Lynch, the brothers of the said Henry Lynch, and to their issue in tail male successively, with power to the said Henry Lynch of charging the said lands and premises with a sum not exceeding £3000 for his daughters." After this there was in the deed a limitation to the use of the settlor, Henry Lynch, and his right heirs for ever.

[The facts as regards the mutilation of the deed are sufficiently referred to in the judgment of the Master of the Rolls.]

The marriage between Peter Lynch and Julia Lynch was duly solemnized. Henry Lynch, the settlor, died in 1822; and in 1833 Peter Lynch was tenant for life, and his eldest surviving son, Charles Lynch, was tenant in tail of the lands put in settlement. By indenture dated June 10th, 1833, made between Peter Lynch and Charles Lynch of the first part, Walter Joyce and Pierce Joyce (trustees of the marriage settlement of Charles Lynch with Helena Joyce, of even date therewith) and John Galway of the third part, and William Galway of the fourth part, and which was a deed to lead the uses of a recovery, it was recited that the said Charles Lynch was "desirous of barring the said entail and all remainders over and expectant thereon, and acquiring the fee-simple of and in the said lands and hereditaments for the purposes thereinafter mentioned." And the indenture witnessed "that for docking, barring, and destroying all estates tail of and in the castle, towns, lands . . . and all remainders and reversions expectant or dependent there-

(1) The plaintiff claimed through John Lynch.

upon, and all conditions and collateral limitations thereunto annexed or affecting the same, and for settling and assuring the same hereditaments to the use of the said Walter Joyce and Pierce Joyce in fee-simple as such trustees as aforesaid, and to and upon the uses and trusts in said indenture of marriage settlement of equal date with these presents expressed and declared of and concerning the same," the lands had been granted to John Galway for the joint lives of himself and Peter Lynch to the intent that the said John Galway might become tenant of the freehold of the said lands, in order that a recovery or recoveries might be suffered. And it was agreed and declared that immediately after judgment should have been obtained and seisin had and taken upon such recovery or recoveries the said lands and premises should be and enure to the use of Walter Joyce and Pierce Joyce, their heirs and assigns, for ever, as an estate of inheritance in fee-simple "upon the trusts and to and for the uses expressed and declared in and by the said in part recited indenture of marriage settlement of equal date with these presents of and concerning the same, and to or for no other uses, intents, or purposes whatsoever."

By the marriage settlement of the same date (June 10th, 1833) the lands and premises were granted to the trustees, Walter Joyce and Pierce Joyce, their heirs, and assigns, for ever, upon certain trusts for providing a jointure and portions, and for preserving contingent remainders, and the uses were thereby declared to be to the use of Peter Lynch for life, with remainder to Charles Lynch for life, with remainders to first and other sons in tail male (with other remainders), but the settlement did not contain any ultimate limitation in fee on failure of the previous limitations, which was the event which happened. And the settlement declared the uses of the recovery or recoveries to be "so that the estate tail of Charles Lynch and all reversions and remainders over now subsisting therein may be barred and destroyed, and that the recovery or recoveries when so suffered shall operate and enure as to the same lands and premises to the use of the said Walter Joyce and Pierce Joyce, their heirs, and assigns, for ever, as such trustees as aforesaid, and to, for, and upon the trusts hereinbefore expressed and declared of and concerning the same, and to, for, and upon no other use, intent, or purpose whatsoever."

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Paragraph 7 of the statement of claim alleged that "as of Trinity Term, 1833, recoveries were suffered in the Court of Common Pleas in Ireland as by the record thereof will appear"; and the defendants in their statements of defence admitted this allegation. Peter Lynch died in 1840, and on his death Charles Lynch entered into possession of the lands. By deed dated 10th November, 1885, Charles Lynch mortgaged the lands to the defendant Henry Lynch.

Charles Lynch died on 30th March, 1897, leaving no lawful issue, and having by his will devised the lands to the defendants Clarkin.

The plaintiff claimed to be entitled to the lands on the death of Charles Lynch in 1897, as representing John Lynch, a brother of Henry Lynch, the settlor in the deed of 29th October, 1800; and proved to the satisfaction of the Court (subject to inquiry as to whether the presumption of the death of an elder brother was well founded) that he was the eldest surviving son of his father, Peter, who was the eldest son of John Lynch, and that as such he was entitled to any estate to which his grandfather John might be entitled as tenant in tail male under the limitations of the settlement of 1800.

The plaintiff submitted that, having regard to the provisions of the two indentures of 10th June, 1833, the recoveries suffered affected the limitations and remainders created by the settlement of the 29th October, 1800, only so far as was necessary to give effect to the uses and trusts expressly declared by the settlement of the 10th June 1833; and that the latter having been exhausted the previous limitations and remainders were still subsisting and capable of taking effect.

In the alternative the plaintiff submitted that the lands and premises were never at any time vested in Charles Lynch in fee-simple, but that on the suffering of the recoveries they became vested in Walter Joyce and Pierce Joyce (the trustees of the settlement of 10th June, 1833) subject to the uses and trusts by said settlement declared, and that on failure of such uses and trusts there was a resulting trust to the uses and upon the trusts declared by the previous settlement of 29th October, 1800, so far as the same were subsisting and capable of taking effect.

The defendants Clarkin contended that at the date of his death in 1897, Charles Lynch was seized of an estate in fee-simple in the lands and premises subject to the deed of mortgage of 10th November, 1885, and that the lands and premises were, subject to the said mortgage, effectually devised by his will to these defendants.

The defendant Henry Lynch was the mortgagee in the deed of mortgage of 10th November, 1885, and in addition claimed to be entitled to three judgment mortgages affecting the estate of Charles Lynch in the lands and premises, and contended that, subject to these, Charles Lynch was at the date of his death seized of an estate in fee-simple in the lands and premises.

Ronan, Q.C., *Campbell, Q.C.*, and *Shiel*, for the plaintiff.

Price, Q.C., *Matheson, Q.C.*, and *Powell*, for the defendants Clarkin.

Gordon, Q.C., and *Day*, for the defendant, Henry Lynch.

July 13.

THE MASTER OF THE ROLLS:—

This action is brought by Thomas Harvey Lynch for recovery of the possession of the Ballycurren estate, in the counties of Mayo and Galway, to which the plaintiff claims to be entitled under the limitations of a settlement of 29th October, 1800, executed on the occasion of the marriage of one Peter Lynch. That instrument, in which Peter Lynch's father, Henry Lynch, was the settlor, undoubtedly comprised the lands in question, which under it stood limited to Henry for life, remainder to Peter for life, with remainder to his first and other sons successively in tail male. The ultimate remainder was to Henry Lynch and his right heirs. So much is a common case. There is a question—with which I shall deal presently—whether the settlement does not contain other limitations intervening between the estates tail of the male issue of Peter and the ultimate fee; and the plaintiff's case would be destroyed without more by showing that there are no such intervening estates. He is not the heir of Henry, nor is he descended from any of the sons of the first Peter Lynch.

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The plaintiff states that he is the fourth son of one Peter Lynch, who was the eldest son of John Lynch, a brother of Henry Lynch, the settlor of 1800. His claim is, therefore, through a collateral line; for Henry Lynch, the settlor, was his grand-uncle.

Plaintiff states that he was the fourth son of his father, Peter. His eldest brother, John, died in 1875. The second, George, died in 1890, leaving daughters, but no sons. The third, Peter, is believed to be dead, not having been heard of for many years, and having, as his letters show, been in bad health when last heard of. He had no issue. It would not, however, be possible to act on the presumption of his death without further inquiry; but such inquiry would be a matter of course, assuming the plaintiff's title to be otherwise established.

Plaintiff's father, Peter, was the eldest son of John. That he was so is proved not alone by the plaintiff's evidence (which I entirely accept), but by a number of old letters from other members of the family now dead—notably from one Thomas Lynch, third son of John, and, of course, an uncle of plaintiff. This Thomas seems to have been a very cunning, covetous, and hypocritical old sergeant of constabulary. I was asked to discredit his statements, and disregard them as affording corroboration of plaintiff's statements. Old Thomas was undoubtedly playing a double game—flattering the plaintiff with assurances of his certain prospect of succeeding to Ballycurren, and flattering Charles Lynch (of whom I must speak presently) with equally positive assurances that he owned Ballycurren in fee-simple, as to which there was even then some doubt. But no question of pedigree arose at all. The pedigree was treated as clear and unquestionable, and no evidence of any other member of the family or of any document whatever has been given to controvert the plaintiff's statements. He seemed to me to be a respectable and faithworthy witness, and I believe he stated to me truly the family repute as to the family matters involved. Subject to the question as to his brother Peter's death without male issue, I think that plaintiff is the eldest surviving son of the eldest son of John Lynch, brother of Henry Lynch, the settlor of 1800, and as such would be entitled to any estate of which John was tenant in tail male.

This brings me to the second question in the case—did the deed of 1800 contain any, and what, limitations in remainder after the estate in tail male to the sons of Peter, and prior to the fee?

The deed as now produced has upon the face of it an interlineation, partially obliterated, on which this question turns. Before considering it, it remains to state that Henry, the settlor, died in 1822, leaving his son Peter, who succeeded him as tenant for life. Peter had in 1833 an eldest son Charles, who was heir of entail, and married in 1833, and on the occasion of his marriage suffered recoveries with a view to re-settling the estate along with his father, Peter. Peter died in 1840, and from that time on till his death on 30th March, 1897, Charles remained in possession, either as owner in fee or as tenant in tail, which is the main controversy in the case. If he was owner in fee the plaintiff has no case. If the recoveries were not operative so as to destroy all the estates tail, the plaintiff would have become entitled on the death of Charles, if the deed of 1800 contained and contains a limitation in tail male in favour of his grandfather.

The deed comes out of the custody of those claiming through Charles or his mortgagees. Its appearance is singular. The interlineation in question is in a minute handwriting, and has been in large measure erased, the erasure extending to a considerable portion of several words of the deed as it was originally engrossed, though this is obviously accidental, and not intentional. At first sight it looks difficult, if not impossible, to decipher some of the words interlined. However, Mr. Burtchaell, who is an expert in such matters, had no difficulty in reading the line except one word, which he conjectures to be "then," and which is and must be quite immaterial. He read the words as follows:—"Then to the use and behoof of John Lynch, Thomas Lynch, and Peter Lynch, the brothers of the said Henry Lynch, and to their issue in tail male successively, with power to the said Henry Lynch of charging the said lands and premises with a sum not exceeding £3000 for his daughters then." I have myself examined the parchment carefully, and with a good glass and in a strong light there is not much difficulty in making out all the material words in the sentence.

In the case of material alterations and interlineations in a deed, the presumption is that they were made before the deed was

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executed, since otherwise the alteration would be a wrongful if not a criminal act, and that must not be presumed. But in the present case there is no need of this presumption. The case is peculiar in this that there are both an interlineation and an erasure, and I think it is plain that the interlineation was made before, and the erasure after, execution. The attestation clause is endorsed on the deed, and it notices the interlineation. Now, when one considers what the interlineation was—that it gave successive estates tail to the brothers of Henry in default of issue male of his sons—how material it was, and at the same time how likely to be forgotten or omitted in preparing a marriage settlement for Henry's eldest son—it is just such a provision as would be likely to be interlined at the last moment, and if once introduced it would be very improbable that it should be struck out. Further, if it had been struck out before sealing by a competent person, it would probably have been done by the process of cancellation, and not by such a clumsy as well as ineffectual way as that of scratching and rubbing which was resorted to. But the attestation clause, which, as it originally stood, noticed and quoted the interlineation, has itself been similarly mutilated, though the mutilation is only partial, the words conferring on Henry Lynch a power of charging for younger children being left.

Another circumstance which shows that the obliteration was made after the execution of the deed is that the names of the witnesses (three) to the deed are also obliterated, though not so as to be entirely illegible. They, of course, appear on the memorial for registration. It is to my mind quite plain that the deed as executed contained the clause in question, and that it was subsequently (but when it would be impossible to say) tampered with by someone interested in preventing the issue of John, Thomas, or Peter Lynch from asserting any right under the deed of 1800. As I have mentioned the memorial of that deed, it is right to say that it does not set out the limitations subsequent to those in favour of the issue of the marriage; but such an omission, though improper, is by no means uncommon when the instrument registered is a marriage settlement.

Just before the recovery was suffered in 1833 two deeds, dated 10th June in that year, were executed—one being the marriage

settlement of Charles Lynch with Helena Joyce, and the other a deed to lead the uses of the recovery. In the latter the uses are expressed to be "upon the trusts and to and for the uses expressed and declared in and by the said in part recited indenture of marriage settlement of equal date with these presents, of and concerning the same, and to or for no other uses, intents, or purposes whatsoever."

This brings us to the settlement to find the uses and trusts on which the estate was to be held; all the estates tail in the lands under the settlement have failed and come to an end. The question is to whom has the fee (whether it be a fee-simple or a fee-tail) passed upon the death of Charles Lynch? Plaintiff says that the uses of the settlement of 1833 having been exhausted, the uses of the settlement of 1800, so far as they have not been exhausted, are still in force; in other words, that the recovery suffered in 1833 is so far spent that we must look to the resulting use, and that the resulting use is simply for the old settlement. For this proposition the reliance of the plaintiff was mainly on the words I have already read, "to or for no other uses, intents, or purposes whatsoever," which occur in both the deeds of 1833. These words indicate (it was argued), that so far as the two settlements can stand together there was no intention on the part of the parties to the latter instrument to interfere with the provisions of the earlier.

The defendants contend that the recovery destroyed all the estates tail in the deed of 1800, and that the remainder in fee, not expressly disposed of, belonged as a resulting use to Charles Lynch and his heirs. Had the recovery come first and independently, so that before the settlement of 1833 Charles Lynch would have been by its operation owner in fee in remainder after Peter's life-estate, there could be little doubt but that the latter contention must, on ordinary principles, prevail. The settlement, however, came first; and the recovery was to enure to its uses and no others. On this small point, I think, the case depends.

Apart from authority there is much difficulty in the present case in giving to the words, "and to or for no other uses, intents, or purposes whatsoever," the force the plaintiff claims for them. The settlement declares the use to be, "so that the estate tail of Charles

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Lynch and all reversions and remainders over" may be barred and destroyed. That is the first and leading intention as expressed. The settlement of 1800 was before the minds of the parties to the deeds of 1833. It is recited in both of them. The direction that the recovery is to enure to no other uses, etc., but those of the settlement of 1833, would appear to be at least as strong an indication that the recovery was not to be of any effect in preserving the old uses of 1800, as that there should be no resulting use in the tenant in tail. The words, "and to no other uses, intents, or purposes whatsoever" are a common form always used in such instruments. (See Preston's Conveyancing Forms): still they must have some meaning. It may be that they mean only no *other* use in the sense of no different or inconsistent use; and, therefore, no personal benefit.

One thing is clear, that Walter Joyce and Pierce Joyce, though they took the fee, took nothing beneficially. The fee is beneficially in the heirs or devisees of Charles Lynch, or in the interlined remainderman of 1800, that is in the plaintiff. But the question remains, in whom in a case like this is the legal use executed?

The legal fiction on which the procedure by recovery with double voucher rests would lead us to expect that a fee-simple would be the result in every case; a fee-simple resting on the judgment of a Court and expanded out of the previous estate tail. But recoveries had long lost their original character as judicial proceedings, and had come to be regarded as merely modes of conveyancing; so much so that they did not change the line of descent. Thus a man inheriting property *ex parte maternâ*, and suffering a recovery, did not thereby alter the line; so that on his death intestate, the fee descended to his heirs *ex parte maternâ*. The fee-simple is not created, but is an expansion of the estate tail. This is familiar knowledge. It remains clear, however, that in every case a fee-simple is the result. I asked for any case in which a fee-simple had not been produced (I have to avoid the use of the word "created"), and none could be procured. Nor, I think, is this denied; the contention being rather that the fee is subject to the provisions of the old settlement operating by way of uses impressed upon it.

In Gilbert on Uses (ed. Sugden) it is stated (p. 110), "if a man seized of lands in tail, levies a fine or suffers a recovery, and declares no uses, the use results to the tenant in tail, and he becomes seized in fee by virtue of the recovery, because the recoveror is tenant in fee-simple, and then no uses are declared of that recovery; and where no consideration appears from the recoveror, the recovery can be to no other purpose than to dock the entail." This same passage, with only some trivial verbal alterations, is repeated at pages 119–123.

The case of *Adams* v. *Savage* (1) is quoted as an authority for the proposition, which it supports, that the use shall not result against the intention of the parties; and is relied on by the plaintiff here as showing that no resulting use in favour of Charles Lynch is to be presumed, the recovery being for specified purposes, and "for no other uses, intents, or purposes whatsoever." But obviously, as I have already said, this principle would equally go to negative a resulting use for the purposes of the settlement of 1800; and the case of *Tanner* v. *Radford* (2) to which I shall presently refer more fully shows how these words are to be dealt with.

To the same effect is the opinion of Mr. Watkins in his book on Descents (4th edition). He says at p. 251: "A common recovery is now considered merely as a 'form of conveyance' or common assurance; and, therefore, if no uses be declared nor any raised to the recoveror, its operation is the same, as to this point, as a feoffment or fine. Each of these conveyances passes a fee; but the fee effected by either is immediately to the use of the person conveying (if such appears the intention of the parties); and as he is thus *in* of his *ancient use*, and the statute uniting the possession to it, he is considered as in of his old estate; and, consequently, the descent remains as before."

But it was said, admitting this, and recognising that where no uses are declared the fee is vested in the person who was before tenant in tail, this is only so where no uses, or only uses which all fail for illegality or some other cause, are declared, and is not so where, as here, uses are declared, and are said to be exclusive, and all have come to an end. This proposition is based upon the

(1) 2 Lord Raymond, Rep. 854. (2) 6 Sim. 21.

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supposition, to be found in some text writers and cases, that if no uses are declared, and inasmuch as trouble and expense are involved in the suffering a recovery, it is necessary to hold that it had an object, and none can be assigned except to transmute the estate tail into a fee. If, however, certain limited uses are expressly declared, there is no need to look further. You have the intent expressed, and you do not require to disturb the old settlement further than that intent requires. As I have said, the scope and method of a recovery seem opposed to this reasoning, and there is really no modern authority at any rate to support it.

Mr. Preston, in his book on Conveyancing (vol. i., p. 194), says:—"Of the declaration of uses. To the clause prescribing the mode of suffering the recovery, there is generally added a declaration of the uses of the recovery itself. This declaration should be in the form in the appendix, or to that effect, *mutatis mutandis*. It seldom happens that a declaration of this nature is omitted. When omitted the use will result unless from the consideration paid by the demandant, or from some other circumstance, the beneficial ownership is evidently to remain with him. The cases of *Moxon* v. *Moxon* and *Hodges* v. *Fowler* in the Exchequer, 1777, and Com. Dig. Uses, D. 2, p. 622, are authorities that the use will result, and it will result to the different parties, according to their former ownership, that is, to tenant for life, for life, &c., with this difference only, that a tenant in tail, instead of taking back an estate tail by resulting use, will take back an estate in fee, depending on the title to his estate tail."

Thus the views of Fearne and of Preston are that the resulting use in the present case would be in Charles Lynch. And indeed it seems difficult to understand how, if the uses declared wholly fail, or if no uses at all are declared, the use results in fee-simple to the previous tenant in tail, no such result should follow when effectual uses are declared, but fall short of exhausting the fee. One would certainly expect that in such a case, and to the extent that the express uses do not reach, the remainder would result to the owner in fee under the recovery. The argument would be intelligible that if no uses are declared the recovery enures to the old uses; though having regard to the nature of a recovery, as a judgment of a Court of competent jurisdiction destroying the entail I

should not deem the argument sound. But the authority of the text writers, representing the opinion of the profession, is, as I have shown, against such a proposition. It is settled that such is not the law. Without any decisions upon the point I should be prepared to hold that when uses are declared upon a recovery, which do not exhaust the fee, the use, so far as it is unexhausted, results to the recoveror, adopting in this the view of Fearne and Preston.

But in fact the very point is decided, and by a tribunal which binds me, at any rate. In *Tanner* v. *Radford* (1) the deed to lead the uses of a recovery was made in 1790, and the recovery was suffered in 1791. The subject of the transaction was an advowson, an incorporeal hereditament, but nothing directly turns upon that. It was manifest that the deed was inoperative except as to the first limitation, for it purported to entail, not the right to present to the living (that of Lapford in Devonshire), but the right to be presented to it. This was good as to the first vacancy (or next presentation), but bad as to the ulterior limitations, and was so held by the Vice-Chancellor during the argument—"But his Honor having said that it was quite impossible to support any of the trusts except the first, and the counsel having so admitted, they then contended that, as the limitations declared by the recovery deed had failed, the prior limitations must be held to be restored, as it must be presumed that the parties to the recovery did not intend to defeat the old settlement, except for the purpose of giving effect to the new one."

The contention was that, as the uses subsequent to the first were void the recovery enured to the uses of the prior settlement, and the cases in Rolle's Ab.: *Bury* v. *Taylor* (2), *Waker* v. *Snowe* (3), *Argol* v. *Cheney* (4), *Armstrong* v. *Wolsey* (5), were relied on.

Stress, too, was laid on the words in the deed of 1790, which occur in the present case, "and for no other use, intent, or purpose whatsoever," which the reporter prints in italics. But the Vice-Chancellor said—"The meaning of the expression, found in the old cases, that, where a recovery is suffered without any use being

(1) 6 Sim. 21.
(2) Godbolt, 179.
(3) Palm. 359.
(4) Latch. 82.
(5) 2 Wils. 19.

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limited, it enures to the old use, is, I conceive, that the use results to the former owner, and in that sense it is the old use. Where the parties to a recovery declare uses which are void, they have in law done nothing at all. The effect of a recovery suffered by a tenant in tail, without any declaration of use, is to enlarge the estate tail into a fee; and, if uses or trusts are declared which cannot take effect, the effect is merely to leave the fee in the tenant in tail."

It was sought to distinguish that case from the present on the ground that the judgment of the Court assumed *all* the uses to be void. If it were so, I am not by any means satisfied that that would alter the result. But, as I have shown, that is not the case. The learned Judge had present to his mind the fact that the first limitation or declaration of use was good and valid. In the case before me all the expressed uses were valid; but they have come to an end, and the fee must belong to somebody. *Tanner* v. *Radford* (1) is, in my opinion, an authority in point, and I must follow it.

The action must be dismissed, and of course with costs.

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The plaintiff appealed (2).

Ronan, Q.C., Blood, Q.C., and *Hunt*, for the appellant :—

The uses declared by the settlement of the 10th June, 1833, did not exhaust the fee. Where the intention was stated for which the recovery was suffered, the deed must be construed as being confined to that. The purpose was declared that Charles Lynch was desirous of barring the entail and acquiring the fee for the purposes thereinafter mentioned, and then that Walter Joyce and Pierce Joyce should hold the lands to the uses declared in the settlement of equal date, and to or for no other uses or purposes

(1) 6 Sim. 21.

(2) In the Court of Appeal before LORD ASHBOURNE, C., and FITZ GIBBON and HOLMES, L.JJ.

whatsoever. When the uses declared by the settlement did not exhaust the fee, there is a resulting trust in favour of the prior limitations under the deed of 29th October, 1800: *Earl of Jersey* v. *Deane* (1); *Davies* v. *Bush* (2). Common recoveries had long lost their character, and had come to be regarded as a mere mode of conveyance: 1 Preston's Conveyancing, p. 8; *Taylor* v. *Horde* (3); *Adams* v. *Savage* (4). The defendants' contention is to ask the Court to consider the effect of the recovery uncontrolled by the deeds; but when the uses of the settlement of 1833 are exhausted, the uses under the settlement of 1800, so far as they are not exhausted, are still in force. *Tanner* v. *Radford* (5) does not apply, because there there was an intention to exhaust the fee; some of the uses in that case were held to be void; but had they been valid they would have exausted the fee. A Court of equity will restrain the operation of a common recovery to those purposes for which it was intended, and will not allow it to have a more extensive effect: 5 Cruise's Digest, p. 444.

Matheson, *Q.C.*, *Henry*, *Q.C.*, and *Powell*, for the respondents Clarkin:—

The recovery suffered in 1833 was effectual to bar the estate tail in the lands, so that the fee became vested in Charles Lynch. If the uses declared in the settlement of 1833 did not exhaust the fee, the remainder would result to the owner in fee under the recovery. Even if the declaration of uses fails owing to some of the uses being void, the estate tail is barred: *Tanner* v. *Radford* (5). The power of suffering a common recovery was inherent to an estate tail and could not be restrained: Fearne on Contingent Remainders, p. 256.

Nov. 27.

The judgment of the Court was delivered by HOLMES, L.J.:—

When this action was heard in the Rolls Court it was necessary for the plaintiff to prove that he is the grandson of John Lynch, brother of Henry Lynch, the settlor in the indenture of settlement of the 29th October, 1800, and also to show that by an interlineation in that settlement his grandfather was given an estate in tail

(1) 5 B. & Ald. 569.
(2) 1 M'Clel. & Young, 58.
(3) 1 Burr. 60.
(4) 2 Lord Raymond, 855.
(5) 6 Sim. 21.

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male in remainder, upon failure of the issue male of Peter Lynch, the son of Henry Lynch. A good deal of evidence and argument was directed to both these matters, with the result that they were established to the satisfaction of the Master of the Rolls; and the defendants accept his judgment thereon. The discussion in this Court was directed exclusively to the validity and effect of two recoveries suffered in the year 1833 by Peter Lynch and Charles Lynch, who were then tenant for life and tenant in tail male in remainder respectively under the settlement of 1800. By deed of the 10th June, 1833, after reciting that Charles Lynch was desirous of barring the entail and acquiring the fee simple for the purposes thereinafter mentioned it was witnessed that Peter Lynch and Charles Lynch, according to their respective estates, granted lands, situated in two counties, the subject of this action, to John Galway, to the intent that he might become tenant to the freehold, in order that one or more good and perfect recoveries, with double voucher, might be had and suffered of the said lands; and it was declared that after judgment in such recovery or recoveries the lands should enure to the use of Walter Joyce and Pierce Joyce, their heirs and assigns, upon the trusts and for the uses of a settlement of even date and for no other uses or purposes. The uses declared by the settlement were for Peter Lynch for life, with remainder to Charles Lynch for life, followed by several successive remainders in tail, the last of which was an estate tail to the daughters of Charles Lynch, as tenants in common. Recoveries were suffered as of Trinity Term, 1833, of the lands in question. Charles Lynch died in 1897, all the estates tail in remainder on his life estate having previously failed; and the question in controversy is whether there having been no further uses than those mentioned declared in the settlement of 1833, Charles Lynch took the fee simple by way of resulting use, in which case the defendants, as his devisees, would now be entitled, or all the limitations in the settlement of 1800, subsequent to Peter Lynch's life estate, were restored, in which case the plaintiff (subject to certain inquiries) would have now vested in him the estate in tail thereby given to the heirs male of the body of John Lynch.

The law relating to common recoveries has been for years a subject of study for legal antiquaries rather than for practical

lawyers; and I am obliged to confess that I find much that has been written about them to be almost unintelligible. Fortunately, however, for both the Court and counsel the points discussed in this case are comparatively simple; and I have no doubt as to how they ought to be decided. Before referring to the question argued before the Master of the Rolls, three matters which were raised for the first time in this Court can be disposed of in a few words. It is objected that no evidence was given of the writs, which ought to have been the initial step in the fictitious suits. More than one answer might be given to this objection; but the shortest is that the plaintiff alleged in the seventh paragraph of the statement of claim that recoveries were suffered as of Trinity Term, 1833, of the lands in question, and at the trial, gave in evidence the exemplifications thereof. The plaintiff thus made the recoveries part of his case, and while he ought not, I think, to be precluded on this account from relying on any defect that appears upon the face of the records produced by him, he is not at liberty to object by reason of the non-production of documents which are probably at this moment in the Record Office, and which might have been forthcoming at the hearing, if their existence had been challenged. It was further suggested that the recoveries were void, inasmuch as it appears from the exemplifications that the remainderman alone was vouched; but this contention was afterwards abandoned, and indeed so far as I can gather from the old text-books it was in later times unusual for the tenant for life to be vouched; and at all events it has been long since decided that a voucher by him was not necessary. The third point is that there was no good tenant to the *præcipe*, inasmuch as the trustees to preserve contingent remainders named in the settlement of 1800, did not join in the grant to John Galway of the 10th June, 1833. But the plaintiff has failed to show that Peter Lynch's life estate was at that date determined by forfeiture or otherwise; and as long as such estate lasted the trustees had no interest to grant. Besides, even if this were not so, the defect is one which has been cured by the 11th section of 3 & 4 Wm. 4, cap. 74.

There remains the question of the resulting use to which I have already referred, and on which alone the legal aspect of the case was discussed in the Rolls Court. Mr. Ronan's argument

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can be stated in a few words. He says that a common recovery had in the course of legal history come to be regarded as a mere conveyance—a conveyance of an elaborate and peculiarly solemn character, but not differing in its incidents from other instruments by which lands were conveyed, or settled. He points out that in the case of other assurances there is no doubt that if lands are granted to such uses as shall be afterwards declared, the previous estates and interests are not disturbed, unless and until the declaration of uses is made, and even then only to the extent to which such uses are actually declared. He argues that the same rule ought to apply to the deed that leads the uses of a recovery; and especially so when the intention is shown by such a provision as is to be found in the deed of 1833, that the lands are to enure to the uses of the settlement of equal date, and for no other uses or purposes. The last-mentioned words were merely a common form of conveyancers; and no argument can be founded thereon, distinguishing the present case from others. There is, however, no doubt that Mr. Ronan is right up to a certain point. That a common recovery was considered a solemn mode of assuring lands is to be read in every ancient treatise; and to a certain extent the doctrine of resulting use applies to it. If, for example, a tenant for life and remainderman in tail joined in a recovery of which no uses were declared, the tenancy for life would either continue, or be restored with all the powers incidental thereto. But the essential object of the recovery was to convert the estate tail into an estate in fee simple. The deed of 1833 contains the usual recital which would be presumed if it were not expressed, that Charles Lynch was desirous of barring the entail and acquiring the fee simple for the purposes thereinafter mentioned. The imaginary recompense given by the fictitious judgment was supposed to take the place of the estate tail, and to satisfy all the claims of the tenancy in tail and the remainders expectant thereon. The demandant recovered lands held for an estate in fee simple; and whatever uses might be declared, or in the absence of any such uses, the estate in tail was replaced by an estate in fee simple. It cannot be denied that this was so, if there were no uses declared. Whatever doubt there may have been on this point in early days, it has

been long since settled, and the contrary has not been argued. Mr. Ronan, however, says that the reason of this is that some effect must be given to the recovery; and if no other object for it can be discovered, it is to be assumed that it was intended to bar the entail. In my opinion this object must always be assumed. Take the case of a declaration of uses, void or illegal. They all fail; and yet it is admitted that in this event the entail would be barred: *Tanner* v. *Radford* (1). Mr. Ronan distinguishes this case on the ground that there was in it an intention to exhaust the fee; but if so, it was only for the purposes of the void uses. The Master of the Rolls has pointed out that in *Tanner* v. *Radford* (1) the first use was good; so that it is an authority for the proposition that where a valid use which does not exhaust the fee is declared, the estate-tail is just as effectually barred as if there had been no declaration of uses. This proposition is decisive for the defendants in the present action. Mr. Fearne, than whom there can be no higher authority, was of this opinion, as shown by the quotations from Mr. Preston's Conveyancing referred to by the Master of the Rolls; and Mr. Preston adopts Mr. Fearne's view as his own. There is no authority either in legal treatise or decided case, the other way. Mr. Ronan referred to *Jersey* v. *Deane* (2), and *Davies* v. *Bush* (3). But these cases do not touch the point. In them there was no question of barring an estate tail. A wife, who had an estate for life with remainder to her children in tail which had failed, with an ultimate remainder to herself in fee, was joined by her husband in levying fines which were to enure for certain purposes; and the question was as to the effect of the uses thus declared. There is no analogy between these cases and the present; and no assistance can be gained from them in deciding the matter now under consideration. For these reasons I am of opinion that the judgment of the Master of the Rolls dismissing the action ought to be affirmed with costs.

Solicitors for the plaintiff: *W. G. Bradley & Sons.*

Solicitor for the defendant Clarkin: *T. F. Kirwan.*

Solicitors for the defendant Henry M. Lynch: *Casey & Clay.*

R. D. M.

(1) 6 Sim. 21. (2) 5 B. & Ald. 569. (3) 1 M'Clel. & Young. 58.

Ross, J.
1899.
Nov. 10.

IN THE MATTER OF THE ESTATE OF DANIEL FITZGERALD GABBETT, OWNER; EX PARTE WILLIAM GABBETT, PETITIONER.

Landlord and tenant—Land Purchase Acts—Superior interest—Rentcharge—Redemption or apportionment of.

A rentcharge was charged on A and B, the former of which was not for sale. As between A and B the rentcharge was primarily charged on B. An application being made to the Land Judge to redeem it out of the purchase-money of B, the owner of the rentcharge opposed, and the order for redemption was refused.

APPLICATION on behalf of Helen T. Lefroy, and E. H. Lefroy, incumbrancers, having carriage of sale, for an order that a certain annuity of £400, created in favour of Mrs. Alicia M. Wilson, by a certain indenture dated the 24th of October, 1860, and made between Charles Monck Wilson (since deceased) of the first part, Meriel Neville Prior of the second part, Alicia Maria Prior of the third part, Henry Cowper and Rev. Thomas Ellis of the fourth part, George Armstrong, and the Rev. Arthur Henry Leech of the fifth part, and Meriel Neville Prior and Mary Jane Prior, of the sixth part, charged on and payable out of the land for sale in this matter, be redeemed; and that the said annuity, and all arrears be placed on the final schedule for payment in its proper priority, as a charge affecting the said lands.

The facts were:—The annuity was charged on Lot 1, part of the land for sale in this matter, with others not for sale; and it was secured by a term of 500 years. By the settlement creating the annuity it was declared that as between the several lands comprised in the term of 500 years, the lands of Knockanroe (being part of the lands comprised in Lot 1 in the printed rental), should be primarily liable to the payment of the said yearly rentcharge in exoneration of the other lands comprised in the said term, but without prejudice to the rights and remedies thereby given for securing and enforcing payment thereof; it being the express

intent and meaning of the parties thereto that Mrs. Wilson and the trustees of the term might from time to time, as occasion should require, resort to all or any part of the said lands for payment of the rentcharge, and enforce the same without regard to the provision above contained, and without being bound to inquire whether the lands of Knockanroe might or might not be sufficient for the payment of the rentcharge.

Wakely, Q.C., for the applicants.

Leech, for Mrs. Wilson:—

We oppose the redemption. There is no jurisdiction to redeem it save as to the lands sold; and it should be apportioned, leaving part on the lands not for sale. It would be unfair to compel Mrs. Wilson to give up her security on the lands not for sale; and such redemption would not be "equitable" under section 31 (3) of the Land Act, 1896.

Wakely, Q.C., in reply:—

It is absolutely expedient and equitable to order the redemption, as the rentcharge is primarily charged on Knockanroe. [Ross, J.: Here she has a perfect security: why should I put her in a different position as if the rentcharge was charged on Knockanroe alone?] Section 16 was inserted in the Land Act of 1887 to facilitate sales. At any rate we are entitled to have the rentcharge apportioned.

Ross, J.:—

I do not think it is "equitable," in the terms of section 31 (3), to order the redemption of this rentcharge which is also charged on extensive other lands. I will make no rule on the motion. Let the applicants apply for apportionment.

Solicitor having carriage of sale: *Shannon.*
Solicitor for Mrs. Wilson: *Tatlow.*

W. C. S.

V.-C.
1900.

Jan. 17.
Feb. 8.

Mcc GWIRE *v.* Mcc GWIRE.

(1899. No. 432.)

Power or trust for sale—Settlement of real estate—Ultimate limitation to husband and his heirs — Declaration that lands should be considered personal estate—Conversion.

By marriage settlement fee-simple lands and certain securities were vested in trustees, upon trust, as to the lands, that the trustees should, upon such application, or with such consent, or at such discretion, as thereinafter mentioned, sell the same, and hold the sale moneys and the rents until sale upon the trusts thereinafter declared; and it was declared that the trustees should stand seized and possessed of the lands, sale moneys, and securities upon trust to permit the same to remain in their then state of investment, or should on the application, or with the consent in writing of the husband and wife, or the survivor, and after the death of the survivor, at the discretion of the trustees, call in the securities and receive the moneys to arise therefrom, or arising from a sale of the lands, if sold, and invest the same as therein mentioned, and pay the rents of the lands till sold, and the interest of the sale moneys, and securities, to the husband, &c., with an ultimate limitation as to the lands, or sale moneys, and portion of the securities, for the husband, his heirs, executors, administrators, and assigns. The settlement contained a power to lay out the trust funds in the purchase of hereditaments, and it was thereby declared that the hereditaments so to be purchased, and the said lands, should be considered for all the purposes of the settlement as personal estate only. The lands had been recently bought by the husband; part of the purchase-money was paid out of the wife's fortune, and the settlement contained provisions for securing the repayment of same in certain events. The lands were not sold, and the ultimate limitation took effect:—

Held, that there was no conversion of the lands, and that they passed, on the death of the husband, as real estate to his heir-at-law.

Originating Summons for the determination of the question whether certain lands of Rathbrack, comprised in a settlement dated the 2nd August, 1860, passed on the death of Armoric Russell Mcc Gwire, intestate, and without issue, as real property to his heir-at-law, or as personal property to his personal representatives.

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The settlement was executed on the occasion of the marriage of the said Armoric Russell Mcc Gwire with Anne Elizabeth Humphreys, and by it the said lands (held in fee), and a charge on lands (both the property of Armoric Russell Mcc Gwire), and a charge on lands (the property of Anne Elizabeth Humphreys) were vested in trustees upon certain trusts therein mentioned.

The terms of the settlement are stated in the judgment of the Vice-Chancellor. It contained a power to lay out the trust funds in the purchase of land.

There was no issue of the marriage.

Armoric Russell Mcc Gwire died intestate in 1874.

Anne Elizabeth Mcc Gwire died in 1897.

The plaintiff was one of the next-of-kin of Armoric Russell Mcc Gwire. The defendant claimed under his heir-at-law.

Harley, for the plaintiff, referred to *Goodier* v. *Edmunds* (1), and the Settled Land Act, 1882 (45 & 46 Vict. c. 38) s. 2 (2).

Whitaker, for the defendant, cited *Hyett* v. *Mekin* (2); *In re Taylor's Settlement* (3); *Walter* v. *Maunde* (4); *Freke* v. *Calmady* (5); *Coles* v. *Courtier* (6).

Feb. 8.

THE VICE-CHANCELLOR:—

The question raised by this summons is as to the conversion of the fee-simple lands of Rathbrack, put in settlement, dated the 2nd Aug., 1860, on the marriage of Armoric R. Mcc Gwire with Miss Anne E. Humphreys. The lands had been purchased by the husband shortly before the marriage, and were conveyed by him in fee-simple to the trustees of the settlement, in whom were also vested certain money and securities for money, for the expressed purpose of making a provision for the intended wife and the issue of the marriage. The lands were conveyed upon trust for the husband till the marriage, and from its solemnization upon trust that the trustees and their heirs should upon such application, or with such consent, or at such discretion as in said settlement

(1) [1893] 3 Ch. D. 455.
(2) 25 Ch. D. 735.
(3) 9 Ha. 596
(4) 19 Ves. 424.
(5) 32 Ch. D. 408.
(6) 34 Ch. D. 136.

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thereinafter mentioned, sell the said lands and stand possessed of the moneys to arise from the sale thereof, and also the rents, issues, and profits of the said lands in the meantime, and until the same should be sold, upon the trusts, &c., thereinafter declared concerning the same. And it was declared that the trustees, their heirs, executors, and administrators, should from the solemnization of the marriage stand seized and possessed of the aforesaid lands, and the moneys to be realized by the sale thereof, as aforesaid, and other the trust funds and securities conveyed and assured to them, upon trust that they should permit the said lands and several securities to remain in their present state of investment, or should, on the application, or with the consent in writing of the husband and wife, during their joint lives, and of the survivor of them, during his or her life, and after the decease of such survivor, at the discretion of the trustees, call in the said securities, or any of them, and receive the moneys to arise therefrom, or arising from a sale of Rathbrack, *if sold*, and invest the same as therein mentioned. And it was further declared that the trustees should pay the rents and profits of said lands till the same should be sold, pursuant to the power thereinbefore given, and should pay the interest of the moneys to arise from the sale aforesaid, and of the stocks and securities in which the same might be invested to the husband for life, or till certain events which have not arisen, and upon the death of the husband, or the happening of any of such events to pay the same rents, interest, &c., to the wife for her life, and subject to the trusts aforesaid, the whole of said lands, or the moneys to arise from the sale thereof, and other the trust funds thereby settled should be in trust for the issue of the marriage, as the husband and wife, or the survivor of them should appoint, and in default of appointment, then for the children in equal shares if more than one; and in case there should be no person in whom the said lands or trust funds should become absolutely vested under the said trusts, then the said lands and trust funds should remain and be upon the further trusts following, that is to say, as to and concerning the lands of Rathbrack, and the moneys to be realized by the sale thereof, and also as to a sum of £4000 therein mentioned, which was brought into settlement by the husband, to recoup the sums brought into settlement by the wife for the sum of

£1200, being a portion of the sums so brought in by the wife, which was to be applied to complete the purchase of Rathbrack, it being the intention of the parties that the lands of Rathbrack should stand charged with the said sum of £1200, from the death of the survivor of the husband and wife, in the event of the lands not vesting in the issue of the marriage; and subject thereto as to the lands of Rathbrack, or the moneys to arise from the sale thereof, and the said sum of £4000 for the husband, his heirs, executors, administrators, and assigns, and to hold the other funds so brought into settlement by the wife upon the trusts therein mentioned as to the same.

The settlement then contained a power to the husband in case he should survive the wife, and marry again, to appoint the income of Rathbrack, or the moneys to be realized by sale of said lands to an after taken wife by way of jointure, and to appoint for the portions of the children of such subsequent marriage any part of the moneys, *lands*, and premises so settled by him, and of the investments thereof, not exceeding one equal moiety of the said *lands*, moneys, and investments. And it was thereby agreed and declared that the hereditaments so to be purchased as aforesaid, and the lands of Rathbrack so assured as before mentioned, should be considered *for all the purposes of that settlement* as personal estate only, and that the rents and profits thereof should be applied by the trustees upon and for the same trusts, intents, and purposes, &c., as were thereby declared and contained concerning the annual income of the moneys, stocks, funds and securities which, or the produce of which, should be invested as aforesaid, or such of them as should for the time being be subsisting and capable of taking effect.

Nothing was ever done by the trustees to convert these lands of Rathbrack, and they still remain unsold. The question then arises, whether there is to be found in the settlement an express and imperative direction to convert them, or a trust for their conversion? It is to be observed, as I have already mentioned, that these lands had been only recently purchased by Mr. Mcc Gwire, and that there remained a part of the purchase money unpaid, and provision is made for the payment of it out of the wife's money and for the repayment of such sum in case there should be no issue of

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the marriage who should take the lands absolutely. It seems highly improbable that this should have been done thus carefully and deliberately if it was intended that there should be at once a conversion of those lands into personal estate. No purpose is disclosed which would have rendered a conversion of them necessary or convenient. It could not have been, because they were real estate, as the settlement provides for the purchase of real estate out of the trust funds. These, however, are mere speculations, and the question is what does the settlement in terms direct? The trustees were not required or empowered to sell of their own motion during the lives of the husband and wife or of the survivor of them, for they were directed to permit the lands on the one hand, and the money funds on the other, to remain in their then present state of investment, *or* to sell them, but this latter they were empowered to do only on the application or with the consent in writing of the husband and wife during their joint lives or of the survivor of them during his or her life. It was only after the death of the survivor that the trustees were empowered to sell at their own discretion. It is not alleged that any such application was made or consent given in the life time of the husband and wife, or the survivor of them, and the lands have remained vested in fee in the trustees to the present day. The trusts of the settlement are framed carefully on this basis; nowhere can I find in any of them any expression of an intention to convert out and out, or to deal with them in any other mode than that which I have pointed out. The expression as to "Rathbrack or the proceeds thereof *if sold*" in itself shows that there was no imperative trust or direction for conversion; the trusts are expressly framed to suit either state of facts, viz: the lands remaining unconverted as fee-simple estate, or as converted if on the application or with the consent of the husband and wife or the survivor, they should have been sold, the proceeds becoming in their place the subject of the trusts. The lands are throughout the deed treated as possibly subsisting in *specie*, and even in the event of the death of the wife in his lifetime the husband is empowered to charge a jointure and portions on these lands as still remaining unconverted. All these considerations appear to me to show conclusively that there was no immediate conversion effected or intended.

But the last passage in the settlement which I have above stated has been strongly relied on as amounting to an imperative direction to convert, or at least to the creation of an express imperative trust for conversion. The passage applies to any lands which might be purchased with trust moneys by the trustees, and also to the lands of Rathbrack. Even in the absence of authority upon the effect of such a declaration, I should decline here to hold that these words were sufficient to take the case out of the general principle, especially when supported by so strong a context. I should be prepared to hold that the parties never intended to take the case out of the rule for all purposes and in all events, a length to which the argument must be pressed. I am of opinion that this is guarded against by the qualifying words "for all the purposes of this settlement," and that the true construction of the clause is that for the purposes of transmission or devolution of interest as provided by the trusts of the settlement the lands should be considered as personal estate. The purposes of the settlement may be reasonably considered to be those for which it was executed, and these are expressed to be making a provision for the said Anne E. Humphreys and the issue of the marriage. It is true that though these were the expressed purposes there is an additional trust, namely, that empowering the husband, in the event of his surviving his wife, to charge the lands with a jointure for an after-taken wife, and portions for his children by her. Still what were really the purposes were the provisions for his then intended wife and the children of the marriage. But there are authorities on the subject; for instance, the case of *Amphlett* v. *Parke* (1), where lands were devised to trustees to sell, and the will directed that the moneys to arise from such sale should be considered and taken as part of the testator's personal estate, it was held on appeal and on a review of the authorities, that the conversion directed by the will was not absolute but partial only, for the purpose of making good the pecuniary legacies, and that such of the legacies as lapsed, so far as they were payable out of the real estate, had lapsed for the benefit of the heir-at-law. The words in that case appear to be as general as those in this, and they

(1) 2 R. & My. 221.

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were held not to be sufficient to prevent the application of the rule of this Court as to conversion.

I therefore hold that in the present case, in the events that have happened, there was no conversion of the lands of Rathbrack, and that they passed on the death of Armoric R. Mcc Gwire as real estate to his heir-at-law.

Solicitor for the plaintiff: *Harley.*
Solicitors for the defendant: *Wallace & Co.*

D. M'C. M.

Ross, J. 1900. March 26.

IN THE MATTER OF THE ESTATE OF JAMES ORMSBY LAWDER, OWNER; SPENCER CAMPBELL THOMPSON, PETITIONER.

Landlord and tenant—Land Purchase Acts—Court letting—Owner in occupation under a deed of covenant—Land Law (Ireland) Act, 1896, sect. 40 (2).

Under an order of the Court an owner entered into a deed of covenant with the petitioner, and a receiver acting under deed, to pay £100 and certain head rents for the use and occupation of certain premises, therein described as "demised premises." Upon a receiver being appointed by the Court a similar deed of covenant was, under an order of the Court, entered into by the owner with the trustees of the petitioner and the receiver.

Held, that the owner was not a tenant within sect. 40 (2) of the Land Law (Ireland) Act, 1896, and not entitled to be included in the request rental.

APPLICATION by the Standard Life Assurance Company, having carriage of the proceedings, for an order declaring that the lands of Lawderdale, and several other lands in the occupation of the owner, under a deed of covenant dated the 12th June, 1895, were not subject to the operation of the 40th section of the Land Law (Ireland) Act, 1896.

By an order of the Court, made the 20th April, 1891, the owner was directed to send in to the petitioner an undertaking, signed by him, to pay to Mr. Edwin Thomas O'Donel, who was then acting as receiver over the estate under a deed, the annual

sum of £100 for the use and occupation of the lands of Lawderdale and the several other lands then in his possession, and a further undertaking to pay the head rent of £16 12*s.* 4*d.* in respect of the lands of Riversdale, the annual sums of about £3 8*s.* 3*d.*, and £3 in respect of Board of Works charges, and a canal charge payable out of the lands of Lawderdale, and also the head rent of £68 5*s.* 6*d.*, and all rates and taxes payable in respect of the lands of Longstones, the head rent of £53 8*s.*, and all rates and taxes in respect of the lands of Ballycolleen, the £100 to be payable half-yearly, and a further undertaking upon the same being tendered to him, to execute a deed of covenant, securing the payment of the said annual sum of £100, head rents, and taxes; the said deed to contain a covenant by the owner to keep in repair the buildings on the land with the exception of a police barrack, and also such other special covenants as the petitioner with the consent of the Court might deem necessary to insert. In pursuance of this order the owner executed a deed of covenant dated the 22nd March, 1892, made between the owner of the first part, the petitioner of the second part, and the then receiver of the third part. This deed contained, in addition to the covenants mentioned above, covenants by the owner not to assign, underlet, or part with the possession of the premises without the consent in writing of the petitioner, not without like consent to erect any dwelling-house "upon the said demised premises," and to cultivate the lands in a proper and husbandlike manner. Power was also given to the receiver, with the consent of the Land Judge, to determine the "said use and occupation" of the lands at any time prior to the 1st November in each year by giving six months' notice. There was also inserted an agreement that the use and occupation thereby created was for the temporary convenience of the parties thereto, and a clause of distress over the "demised premises." There followed a proviso that nothing therein contained should in any way be held to constitute the petitioner as a mortgagee in possession. The then receiver, who was a receiver under deed, ceased subsequently to be receiver, and the present receiver was appointed receiver under the Court on the 28th November, 1894. By a deed of covenant dated the 12th June, 1895, in pursuance of an order of the Court, and made between the owner of the first part, the

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trustees on behalf of petitioner of the second part, and the receiver of the third part, the owner covenanted to pay, pending the matter, the annual sum of £100 to the receiver, and also to pay the head rents, taxes, and charges; the other covenants therein were similar to those in the former deed, and the words "demised premises" occurred several times; and the six months' notice which the receiver was empowered to give was to expire on "any gale day."

J. Herbert Shaw, for the petitioner:—

These deeds of covenant do not constitute a contract of tenancy within the 40th section of the Act of 1896. Neither the Land Judge nor the Receiver Judge are parties to them. At the date of the first deed there was no tenancy, and no letting could be made till a receiver was appointed. At that time, and till the Act of 1896 passed, the owner, if a Court tenant, could not purchase under the Land Purchase Acts: *In re Lawrence's Estate* (1). Did section 40 of the Act of 1896 alter the case? The deeds do not demise the lands: they only contain covenants to pay for the use and occupation; and the use of the words "demised premises" would not make the deeds operate as deeds of demise. Further, the receiver or the mortgagees had no power to demise.

H. G. Richards, for the owner:—

There was a tenancy created under the first deed. The owner holds in substance under a letting from this Court, which is a Court of Equity. There was an actual order of the Court referring it to the Chief Receiver to fix the rent, which is in itself sufficient to constitute a Court letting. We rely on the form of the deed; it contains the ordinary covenants to repair, and not to underlet the "demised" premises; also a power of distress over the "demised" premises, and a power of re-entry. We rely also on the provision that the tenure could only be determined with the consent of the Land Judge. The first deed was a letting from the mortgagee, and was in substance a Court letting; and it could only be deter-

(1) [1896] 2 I. R. 347.

mined with the sanction of the Court; if it was not a Court letting at least it was a contract of tenancy entered into by the mortgagee with the owner. The second deed was executed under an order of the Court, and it was made with the receiver as such. We rely on the expression "gale days" in it, and the insertion of the other covenants similar to the first. All these words are applicable to a tenancy. It cannot be said that, because an unusual form of conveyancing was adopted, this is not a Court letting. We are within the spirit of the 40th section, and unless it is shown that it is absolutely necessary that the Land Judge or Receiver Judge should be a party to the deed, we are within the section in this Court—a Court of Equity. The receiver is an officer of the Court. If this were the case of an ordinary tenant, and not the owner, proposing to take land from the receiver, could it be said that it was not a Court letting? When *In re Lawrence's Estate* (1) was decided no Court tenant was within the Act. If this is not a Court tenancy the owner had a tenancy from the mortgagees under the Act of 1860.

Shaw, in reply, referred to the last clause in the first deed, providing that nothing therein should be held to constitute the petitioner as a mortgagee in possession.

Ross, J.:—

By the statute this Court is directed to make an offer to persons appearing to be in occupation as tenants. It is clear that my jurisdiction is limited to the case of a tenant in occupation of a holding—that is, in occupation of a parcel of land held by a tenant of a landlord under a contract of tenancy. A contract of tenancy involves three things, namely, land, a landlord, and a tenant.

Take now the position of the parties under the first deed. Where is the landlord? He is himself tenant also. The relationship of landlord and tenant does not exist. The second deed simply follows the first deed, with this change, that the covenant was made with the receiver instead of with Mr. O'Donel. This did not alter the position of the parties; and there was still no

(1) [1896] 2 I. R. 347.

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landlord and no holding. But it is said that sect. 40 has made a change, and has altered the law as it was at the time when *Lawrence's Estate* (1) was decided. The Act of 1896 in sect. 40, sub-sect. 2, enacts as follows:—"Any person in occupation of and paying rent for a parcel of land (including the owner of an estate in occupation of a mansion house or demesne forming part of the estate) held under a letting by the Land Judge or Receiver Judge, may agree to purchase such parcel of land, and the same shall be deemed a holding, and such person a tenant, and the Land Judge or Receiver Judge, as the case may be, a landlord within the meaning of the Land Purchase Acts."

I think it is plain that Mr. Lawder is not within the terms of the sub-section. He does not hold under a letting by the Land Judge or Receiver Judge; accordingly, I am of opinion that he does not occupy as tenant; and I direct him to be excluded from the request rental.

Solicitors having carriage: *Whitney & Moore.*
Solicitor for the owner: *J. O. Lindsay.*

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(1) [1896] 2 I. R. 347.

IN THE MATTER OF THE ESTATE OF ROBERT C. WADE, OWNER AND PETITIONER; AND IN THE MATTER OF THE ESTATE OF CRAVEN H. C. WADE, OWNER AND PETITIONER. (CONSOLIDATED BY ORDER DATED THE 24TH JANUARY, 1887.)

Ross, J.
1900.
Jan. 12.

Land Judge's Court—Practice—Transfer of carriage—Handing over of papers—Solicitor's lien.

The representatives of a deceased solicitor, who had carriage of the proceedings, are not entitled to retain the papers in the matter as security for his costs, but must hand them over, subject to lien, to the solicitor to whom carriage is transferred.

APPLICATION on behalf of the owner and petitioner, Craven H. C. Wade, for an order transferring the carriage of the proceedings in the consolidated matter to Messrs. F. Sutton & Son, solicitors for the said owner and petitioner, and that Mr. Samuel Abbott, the solicitor for the representatives of the late Mr. Alfred M'Dermott should hand over to Messrs. Sutton & Son all deeds and documents relating to or in connexion with these matters now in his custody, power, or procurement, subject to any lien which might be existing thereon for the costs of the late Mr. Alfred M'Dermott, who had been, up to the time of his death, solicitor having carriage.

The facts of the case were as follows:—By order dated 24th January, 1887, the two matters were consolidated, and by order dated the 13th November, 1894, carriage of the consolidated matter was transferred to the late Mr. Alfred M'Dermott, formerly solicitor for both the owners in the respective matters. Mr. M'Dermott died on the 3rd September, 1899, and probate of his will was granted on the 31st October, 1899, to his widow; but carriage had not been transferred. R. C. Wade had recently died. Craven H. C. Wade had authorised Messrs. Sutton & Son to act as his solicitors. Messrs. Sutton & Son applied to Mr. Abbott on 31st October, 1899, requiring the papers to be handed over to

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them, as several matters required to be dealt with without delay, which could not not be done until the papers were handed over. Mr. Abbott claimed a lien on all the papers for certain costs.

Henry G. Richards, for the applicant:—

The Land Judge has jurisdiction to order the papers to be handed over subject to lien, as is the practice in the Chancery Division. A lien cannot be put forward to prevent the proceedings being carried on: *Gerty* v. *Mann* (1); *In re Boughton*; *Boughton* v. *Boughton* (2).

Samuels, Q.C., for the executrix of the late Mr. M'Dermott, cited *Ackerman* v. *Lockhart* (3), and *Boden* v. *Hensby* (4).

Ross, J.:—

In this case carriage must be given to the Messrs. Sutton. As the proceedings in this Court are of a representative character, enuring for the benefit of persons other than the petitioners, the Court cannot allow the proceedings to be tied up in the interest of the solicitor for any of the parties. The papers must be handed over, subject to the solicitor's lien. Let his costs be taxed, that he may be at liberty to apply for payment at any time, if so advised.

Solicitors for the applicants: *F. Sutton & Son.*
Solicitor for the executrix of Mr. M'Dermott: *Abbott.*

W. C. S.

(1) 29 L. R. Ir. 7.
(2) 23 Ch. D. 169.
(3) [1898] 2 Ch. 1.
(4) [1892] 1 Ch. 101.

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V.-C. 1899. July 4, 26.

(1899. No. 630.)

Will—Construction—Residuary gift—Lapsed and revoked shares of particular residue—Gift to wife and children then living—Class.

A testator bequeathed certain articles consisting of works of art, &c., specifically to individuals, and directed that all his furniture, . . . objects of art and household goods, not by his will or any codicil thereto otherwise bequeathed, should be sold within six months after his decease, and that the money arising from the sale should be divided equally between his wife and all his children then living, share and share alike; and after other dispositions he bequeathed the residue of his property to one of his children. By a codicil he revoked all gifts to another child D. The specific legatees and the testator's wife died in his lifetime:—

Held, 1, that the specific legacies fell into the particular residue; 2, that the shares of the wife and D. of that residue did not pass to the general residuary legatee, but went to the children, other than D., living at the period of distribution.

Originating Summons.

William M'Kay made his will dated the 19th October, 1867, and thereby after appointing his son William and his daughter Fanny executor and executrix, he bequeathed to his wife and certain other persons, respectively, certain articles consisting of plate, portraits, paintings, prints, &c. The testator then proceeded, "I direct that all my furniture, books, pictures, prints, plate, plated ware, objects of art, and household goods, not herein or by any codicil hereto otherwise bequeathed, shall be put up to public auction within six months after my decease, and I authorise and empower my wife and each of my daughters to purchase or buy in or to appoint any person or persons on their behalf, respectively, to bid for, purchase, or buy in at such sale or sales any articles or lots then put up to the extent and amount of £100 for each of them my said wife and each of my said daughters; and I bequeath to them, respectively, the articles and things so purchased and

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bought in, and I direct that the same shall belong to them without payment by them for or in respect of the same; and I direct that the money arising from the sale of the residue of the goods and chattels so to be sold as aforesaid shall be appropriated in the first place to the payment of my just debts of simple contract due at the time of my decease, and the surplus or residue of the said money shall be divided equally between my said wife and all my children then living, share and share alike"; and after certain other bequests and devises, including a devise to his son Daniel, the testator continued, "I give, devise, and bequeath all the rest, residue, and remainder of my property of whatever kind the same may be, whether real or personal, to my daughter Frances Anna, hereby appointing her my residuary legatee."

The testator made a codicil dated the 15th July, 1868, and thereby revoked all gifts to his son Daniel contained in his will.

The testator died on the 8th February, 1899, and probate of the will and codicil was granted on the 1st May, 1899, to William and Frances Anna M'Kay.

The testator's wife and the other specific legatees died in his lifetime: he left four children surviving him, viz. the said William, Frances Anna, and Daniel M'Kay, and Rhoda Forbes.

This was a summons taken out by William M'Kay against Frances Anna M'Kay as defendant to have it determined: (1), whether the articles specifically bequeathed fell into the general residue and passed to the defendant, or whether they formed portion of the particular residue directed to be sold; (2), whether the shares of that particular residue which would have been payable to the testator's wife if she had survived him, and to his son Daniel if the bequests to him in the will had not been revoked, passed to the residuary legatee, or were to be divided amongst the other children who survived the testator.

Charles Brady, for the plaintiff:—

The direction to sell applies to the subject-matter of the specific bequests which have lapsed or been revoked: the testator takes the specific articles out of his general property and makes them the subject of a particular series of gifts, including a special residuary clause quite apart from the general residuary bequest:

not otherwise "bequeathed" means not otherwise "effectually bequeathed": 1 Jarm. Wills (5th Ed.) 720, 721; *De Trafford* v. *Tempest* (1).

The lapsed and revoked shares of the sale moneys go amongst the other children. The wife and children formed a class, and there are no words of gift save the direction to divide the surplus proceeds of the sale; that sale was to take place six months after the testator's death, and the money was to be divided between the wife and children then living; that is the period of vesting, and the class has shrunk since the date of the will. Though a class will usually consist of persons who can be described by some general name, a gift to children and another person may be a gift to a class if the testator treats them as such: see 1 Jarm. Wills (5th Ed.) 232; *Re Stanhope's Trusts* (2), and the judgment of Sir John Romilly, M.R., p. 203; *In re Featherstone's Trusts* (3), and the judgment there of Kay, J. The legatees in this case form an artificial class.

George C. Green, for the defendant:—

The terms of the will in this case are distinguishable from those in the authorities cited, and the effect is that the articles specifically bequeathed are taken entirely out of the class of objects directed to be sold. In *De Trafford* v. *Tempest* (1) the words were "not otherwise disposed of." There, moreover, there was no such segregation as in the present case, and here the direction to sell is not confined to articles of the same kind as those specifically bequeathed. The lapsed legacies fall into the general residue: *Patching* v. *Barnett* (4), cited in Theobald, Wills (4th Ed.) 192: see also the judgment of this Court in *Harris* v. *Harris* (5), quoted by Lindley, L.J., in *Paton* v. *Ormerod* (6).

The gift of the sale moneys is not a gift to a class, and the shares of the testator's wife and son, Daniel, do not go to the other children: *Creswell* v. *Cheslyn* (7), approved of in *Shaw* v. *M'Mahon* (8). A class must consist of persons all filling one

(1) 21 Beav. 564.
(2) 27 Beav. 201.
(3) 22 Ch. D. 111.
(4) 28 W. R. 886.
(5) I. R. 3 Eq. 610, 618.
(6) [1893] 3 Ch. 348, 358.
(7) 2 Eden, 123.
(8) 4 Dr. & W. 431.

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common character, or holding some definite position: see per Wood, V.C., in *Re Chaplin's Trust* (1); *Wilson* v. *Atter* (2). The wife who is specified and the children do not constitute a class.

Brady, in reply :—

On the first question, *Champney* v. *Davy* (3) applies.

As to the second question, *Patching* v. *Barnett* (4) is in direct conflict with Lord Romilly's decision in *De Trafford* v. *Tempest* (5). *Creswell* v. *Cheslyn* (6) was the case of a simple gift to persons as tenants in common. This case is governed by *In re Featherstone's Trusts* (7).

July 26.

THE VICE-CHANCELLOR :—

Two questions arising on the will of William M'Kay are now raised for decision, one whether certain articles specifically bequeathed thereby, the bequests of which lapsed, fell into his general residuary estate, or whether they formed portion of the particular residue directed thereby to be sold. The other is whether the share of that particular residue left to the testator's wife who predeceased him, and the share of the same left to his son Daniel which was revoked by a codicil, passed to the residuary legatee or accrued to the other children of the testator.

The testator gave a large number of valuable works of art and other articles specifically to individuals named by him, and directed that all his furniture, books, pictures, &c., not by his said will or by any codicil thereto otherwise bequeathed should be sold by auction within six months from his decease, and that the money arising from the sale of the residue of the goods and chattels so directed to be sold should be applied to payment of his debts, and the surplus or residue of the said money should be divided equally between his wife and all his children then living. He made several other testamentary dispositions, and then devised and bequeathed all the rest, residue, and remainder of his property of

(1) 12 W. R. 147, 148.
(2) 44 L. T. (N. S.) 240.
(3) 11 Ch. D. 949.
(4) 28 W. R. 886.
(5) 21 Beav. 564.
(6) 2 Eden, 123.
(7) 22 Ch. D. 111.

whatever kind to his daughter Frances, thereby appointing her his residuary legatee. Several of the specific legatees of the articles given by the will predeceased the testator, and the first question is whether their lapsed legacies fell into the particular residue of his furniture, books, pictures, &c., not by his will or any codicil otherwise bequeathed, or whether they fell into the general residue bequeathed to his daughter Frances.

It is a general rule as to the operation of residuary gifts that, in the absence of language expressing a different intention, they pass all property not only altogether undisposed of, but which in the events which happen is not effectually disposed of. This rule seems to me to apply equally to general residuary gifts, and to residuary gifts confined to dispositions of particular portions of the estate of the testator. When a particular portion of the personal estate is the subject of disposition, and the will contains a residuary gift applying to it alone, such particular residuary gift will, in the absence of the expression of a contrary intention, capture any part of, or interest in, this particular portion which is either actually undisposed of, or in the event becomes undisposed of, and the same will not fall into the general residue, or come within the operation of a general residuary gift. In the will we are dealing with there is a separate disposition of the testator's furniture, books, pictures, prints, plate, plated ware, objects of art, and household goods. He gives certain articles of this kind to legatees specifically, and he then directs that all of them not by his will, or any codicil thereto otherwise bequeathed shall be put up to public auction, and the proceeds applied as I have already mentioned. I am of opinion that the words "not by his will or any codicil thereto otherwise bequeathed" must be construed as applying to any articles which, though expressed to be so bequeathed, became undisposed of by lapse or otherwise. I, therefore, answer the first question thus: that these lapsed specific bequests formed portion of the particular residue directed to be sold, and did not fall into the testator's general residuary estate.

The second question is, whether the share of the testator's wife, who predeceased him, of the surplus proceeds of the money produced by the sale so directed, survived to the testator's children living at the time of the sale, or fell into the general residue of his

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personal estate. This depends on the question whether the gift of this surplus was to his wife and children as tenants in common, or, as a class. If the former, the wife's share fell into the general residue, and was undisposed of save by the general residuary gift. If the latter, it survived to the other members of the class. This was, in my opinion, a gift to a class which consisted of his wife and children living at the time of distribution. The money arising from the sale was to be equally divided between all these legatees, including the wife, in equal shares. The amounts of these shares could not be ascertained till the period of distribution. The legal definition of a gift to a class depends on the mode of the gift which must be a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in certain proportions, the share of each being dependent upon the ultimate number of persons. Now, here the gift was to an aggregate number of persons, namely, the wife and children of the testator living at the period of distribution, the number of whom was necessarily uncertain at the time of the gift, and was to be ascertained at the future period of distribution, and such persons were to take in certain proportions, the share of each, including the wife, being dependent on the number of persons to take at the period of distribution. The same reasons apply to the share of Daniel, which was revoked by the codicil.

I am accordingly of opinion that these two shares did not pass to the general residuary legatee as being undisposed of, but became and are divisible between the children of the testator, other than Daniel, in equal shares.

Solicitors: *Richardson & Synnott.*

D. M'C. M.

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND *v.* THE COGRY FLAX SPINNING COMPANY, LIMITED.

(1898. No. 247.)

M. R.
1898.
Nov. 29, 30.
Dec. 14.
1899.
Feb. 2, 3, 4, 9, 10, 11, 20.

Company—Debentures—Equitable incumbrancers—Possession of title deeds—Priority—Inquiry—Negligence—Conflicting equities—Postponement of prior incumbrance—One man Company—Debentures issued to director to make good private breach of trust by him—Investment of trust funds in business—Notice to director not notice to Company.

The directors of a limited Company had power under the articles of association to raise by mortgage or debenture such sums as they should think expedient, and to charge the property of the Company therewith. The company was formed to take over the business of M. M. was managing director and practically the owner of the Company, the shares never having been offered to the public, and except for the limitation of liability the concern went on as before the formation of the Company.

On April 1st, 1897, the Company being indebted to its bankers, and requiring further advances, issued debentures in favour of the bank, charging the same on all the property of the Company. These documents showed that there was power to issue further debentures. There was a collateral agreement by the Company authorizing the bank to hold the debentures as a collateral security for advances and transactions.

On 16th April, 1897, two further debentures charged on the property of the Company for the sum of £11,000 were issued to M. and T., who were the trustees of the estate of B., deceased. According to affidavits in the case £9323, representing the B. trust estate, was (in breach of trust) invested by M. and T. in M.'s business prior to the incorporation of the Company, and the Company took over the liability for this debt. It was also stated in the affidavits that a further sum of £2962, also portion of the B. trust estate, was advanced by the trustees to the Company and invested in the business, and that the Company had undertaken to give security for all the moneys due by the Company to the trust estate.

On 28th May, 1897, M. deposited certain title deeds of the Company's property with the bank as a collateral security for all moneys then due or to become due by the Company to the bank. When this charge was given the amount due to the bank exceeded the nominal amount of the debentures issued to them on April 1st. The bank had no notice of the existence of the

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debentures of April 16th, and made no inquiries. The bank commenced an action to enforce its securities, and the Company passed a resolution for voluntary winding up. By the judgment of the Court the debentures issued to the bank were declared valid, and a sale was directed. An application was made on behalf of the *cestuis que trust* of the estate of B. for liberty to intervene in the action and to have it declared that the debentures of 16th April issued to M. and T. were charged on the property of the Company in priority to the equitable charge in favour of the bank by deposit of title deeds on May 28th :—

Held, on the assumption that, at the date of the issue of the two debentures for £11,000 there was money due by the Company to M. and T. as trustees of the B. estate, that the bank, as having the stronger equity, were entitled to priority in respect of their equitable mortgage over these two debentures.

Subsequently it was established by oral evidence taken in Court that the trust funds had been mainly spent by M. in Stock Exchange transactions, and that so far as any had been invested by him in the business, they constituted a private debt of M., and that his liability was not taken over by the Company, and that any trust moneys advanced to the Company had been repaid :—

Held, that neither in fact nor in law had the Company any notice of the trust, and that the debentures were issued without authority and without consideration, and did not bind the assets of the Company, as against creditors.

MOTION.

By their statement of claim in the action, the plaintiffs claimed a declaration that twenty-three mortgage debentures for the principal sum of £1000 each and interest thereon, at five per cent. per annum, constituted a first charge upon all the undertaking and property of the defendant Company, except so far as a mortgage by deposit of title deeds of 28th May, 1897, and certain liens mentioned in the statement of claim took priority thereof. The statement of claim also asked for an account, for payment of the amount found to be due, to have the said debentures enforced by sale, and to have a receiver and manager appointed over the Company's property. The plaintiffs also claimed to have an account taken of what was due to them on the security of the deposit of title deeds of the Company's property, made on the 28th May, 1897.

The writ of summons in the action was issued on the 12th March, 1898. On the 21st March of the same year, a resolution to wind up the affairs of the Company in voluntary liquidation

was passed, and for that purpose Mr. M'Cullough was appointed liquidator, and by order of the Court made in the action he was also appointed receiver.

By judgment of the Court, dated 26th July, 1898, it was declared that the plaintiffs as holders of twenty-three mortgage debentures, each dated 1st April, 1897, were entitled to a first charge on all the real and personal property of the Company, including uncalled capital, for £23,000 and interest, from the 10th March, 1898, for securing the repayment of the principal moneys and interest in the agreement of the 1st April, 1897, in the pleadings mentioned; and the Court declared that the plaintiffs were entitled, by virtue of the deposit of title deeds in the pleadings mentioned, to an equitable lien or charge upon all the hereditaments and premises of the Company comprised in these deeds, for securing to the plaintiffs all moneys due by the Company to the plaintiffs on the Company's current account with the plaintiffs, and all bills, &c.

On the 22nd November, 1898, an application by motion on notice, was made to the Court on behalf of Lily Dobson Broadbent and others, minors, by their next friend, and on behalf of William M'Meekin and John Taylor, for an order that the applicants might be at liberty to intervene in the action, and attend the proceedings therein, and that it might be declared that two debentures of the 16th April, 1897, for the respective sums of £6000 and £5000, issued by the defendant Company to William M'Meekin and John Taylor, with interest thereon at four and a-half per cent. per annum, might be declared well charged on the lands, buildings, undertaking, &c., as a second charge upon the said premises, after the debenture charge of the plaintiffs, and that if necessary an inquiry might be directed as to the amount due on foot of the debentures of the 16th April, 1897.

The facts of the case as they appeared on the hearing of this motion, and the other circumstances of the matter, so far as they are connected with the question of priority which was presented for determination, are sufficiently stated in the judgment.

Law, Q.C., and *Shaw*, for the plaintiffs, the Bank of Ireland.

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Matheson, Q.C., Samuels, Q.C., and *A. Todd*, for Lily Broadbent, and the other minors of the Broadbent family, in support of the application.

Gordon, Q.C., and *J. H. Moore*, for the liquidator of the defendant Company.

Dec. 14.

THE MASTER OF THE ROLLS:—

This is a motion by Lily Dobson Broadbent, and others, minors, by Samuel A. Broadbent, their next friend, and by William M'Meekin and John William Taylor, for liberty to intervene and attend the proceedings; and for a declaration that two debentures of the defendant Company for £6000 and £5000 respectively, dated the 16th April, 1897, with interest, are well charged on the property of the Company as a second charge after the debentures (for £23,000) of the plaintiffs, the Bank of Ireland, and for other consequential directions. By the primary decree in the action, dated 26th July, 1898, it was declared that the bank's debentures which bear date 1st April, 1897, were a first charge upon the whole property, undertaking, and assets of the Company, which is now in liquidation. The present applicants were not parties to the action; but they do not seek to disturb that part of the decree, admitting the priority of the bank's debentures over theirs. The bank, however, also claimed a further charge by deposit of title deeds to secure the indebtedness of the defendants to them on account current, or on bills. This deposit was made on the 28th May, 1897; and as the debentures held by the applicants bear date, as I have said, the 16th April, 1897, the object of this application is to assert for their securities a priority over the plaintiffs' claims on foot of their equitable security by deposit; and *prima facie* they would be entitled to this. The securities are all merely equitable; and if other things were equal, their priorities *inter se* would be regulated by their dates. The decree does not declare anything as to priority of the bank's security by deposit; and if it did, it would not bind the applicants. It merely directs an account. Contemporaneouly with the issue of the plaintiffs' debentures, the defendant Company, on the 1st

April, 1897, executed under its seal an agreement authorising the bank to hold the debentures as collateral security for advances and transactions, and to sell them at their discretion. There is no doubt that the amount due to the bank largely exceeds the nominal amount of the debentures, hence the importance of the question as to priorities between the subsequent securities. A sale of the mill premises and offices, &c., of the Company, as a going concern, has been ordered, but has not yet been carried out. The amount which may be realised is of course uncertain, but it has been treated as more than doubtful whether the proceeds will cover the three securities.

The facts connected with these transactions, and which it is necessary to consider, appear to be as follows:—

The defendant Company was incorporated in 1894, for the purpose of acquiring and carrying on the business of flax, linen, and yarn merchants, previously carried on by William M'Meekin (one of the applicants), and all the business premises, &c., owned by him at Cogry, in the county of Antrim, and Bedford-street, Belfast, with all stock-in-trade, goodwill, &c., therein, with a nominal capital of £100,000. It was strictly a private and, indeed, a one-man Company. The shares were never offered to the public; and except for the limitation of its liability, the concern went on as before. The articles of association gave the directors (76 (8)) express power from time to time to raise by mortgage or debenture such sums of money as they should think expedient, and to charge the whole or any part of the property of the Company therewith.

It appears from the joint affidavit of William M'Meekin and Samuel Arthur Broadbent, that Mr. S. E. Broadbent and his wife, who had both died before 1894, had by their wills, dated, respectively, the 27th December, 1888, and the 24th January, 1889, bequeathed their property to M'Meekin in trust for their children, who are joined with him in this application; and John W. Taylor was, on the 16th June, 1894, joined with him as co-trusteee. At the date when the Company was incorporated, it is stated that the trustees of the Broadbent estate had lent £7669 19*s.* 11*d.* of the trust funds to the business of M'Meekin in connexion with its Belfast branch; and £1653 15*s.* in

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connexion with the Cogry mills, these two sums making together £9323 14*s.* 11*d.* It does not appear that there was any authority for a trustee to make such a loan, which was a clear breach of trust. It was a loan by a trustee to himself, without security, and was by him employed for the purposes and subject to the risks of his own trading.

In the affidavit of Messrs. M'Meekin and Broadbent, it is stated (paragraph 2) that "the shareholders in the defendant Company (with the exception of three nominal shareholders who signed the memorandum of association for one share each to make up the statutory number of shareholders) consisted of William M'Meekin, his wife, and members of his family, all of whom were aware of the said liability for £7669 19*s.* 11*d.*, and £1653 15*s.*; and the Company took over the liability for the same, and this debt was always entered in the books of the Company. Considerable sums were paid or allowed from time to time on account of interest by the defendant Company on foot of the said liability. We refer to a true copy of the statement of affairs of the defendant Company, made up to the 1st January, 1895, and audited, being for the first year's trading of the defendant Company, from the 1st January, 1894, from which date it took over the business. We also refer to a true copy of the statement of the Broadbent account taken from the Company's books. From this statement it appears that there was no break in these accounts from the old Company to the defendant Company, that the same books were used and the accounts continued."

Paragraph 5 states, that "the said sums of £7669 19*s.* 11*d.*, and £1653 15*s.*, had been invested by the said William M'Meekin, in the said business carried on by him at Bedford-street, Belfast, and at Cogry mills aforesaid, and so continued after the formation of the defendant Company, and the same was employed in the business of the defendant Company."

The affidavit proceeds:—"After the formation of the Company further sums amounting to about £2962 10*s.*, also portion of the said trust estate were by the said William M'Meekin and John W. Taylor, as such trustees, advanced to the said Company and invested in the business. The defendant Company had undertaken to give security for all the moneys so advanced and due by

the Company to the said trust estate." The trustees wrote a letter of the 20th April, 1897, to the defendant Company, which is set out in the affidavit, but which was after the circumstance of the debentures. It states:—"Referring to our agreement that you should either repay or secure the moneys which we have lent to you on joint account," that is the debentures; "and seeing you have in response to our demand issued to us by way of security mortgage debentures on your assets and property for the amount of such indebtedness; in consideration of such security we are willing to allow the money to remain at interest with you at four and a-half per cent."

The affidavit states "accordingly by two debentures, dated the 16th April, 1897 (to which we beg to refer) duly issued under the seal of the defendant Company, and registered in the Company's register of mortgages, the sum of £11,000, then due to the said trust estate was secured to William M'Meekin and John William Taylor, trustees for the said Lily Dobson Broadbent, &c. . . . All the other liabilities and debts shown on the statement of the 1st January, 1894, were paid, discharged, or satisfied by the defendant Company, the same running off as trade debts in the ordinary course of business as continued by the defendant Company; the liability to the Broadbent estate continuing as an investment. On the 12th March, 1898, the Bank of Ireland instituted the proceedings in this action, and claimed as debenture holders of the defendant Company, and sued on behalf of themselves and all other holders (if any) of mortgage debentures in the defendant Company. On the 19th March, 1898, this honourable Court appointed John M'Cullough, of Belfast, receiver and manager of the defendant Company, until further order; and on the 21st March, 1898, the defendant Company passed a special resolution for voluntary liquidation, appointing the said John M'Cullough liquidator in the winding-up. On the 13th July, 1898, judgment was given by this honourable Court, declaring the debentures issued to the plaintiffs in this action valid, and directing a sale of the Cogry mills, the plaintiffs to have carriage thereof. The plaintiffs advertised the said premises for sale by tender . . . but no tenders were sent in, in pursuance of

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this advertisement. Since the Company went into liquidation the business has been and is still carried on by the liquidator under the same management as previously. On the 6th April, 1898, the said liquidator issued to the creditors a statement of the affairs as at 8th March, 1898, to a copy of which we beg to refer. . . . In this statement the liquidator set out the said two debentures issued to secure the said trust moneys as a second charge for £11,000 to the trustees of the Broadbent estate."

The account given by M'Meekin of the dealings with this fund is not satisfactory. He says, and no doubt it is true, that the balance-sheet of his business, for a period prior to the formation of the Company, showed that "trustees Broadbent" were creditors for £7669 19*s.* 11*d.* against the Bedford-street concern, and that "S. E. Broadbent" was a creditor against the Cogry Mills for £1653 15*s.* It may also be taken as true that the other directors and shareholders of the one-man Company knew how this was when the Company was registered. But the way the books were kept in reference to this alleged account is very unsatisfactory. No proper account, in fact, appears in the books, so far as I have been able to see, such as a fair ledger should disclose, putting principal and interest on one side, according to dates, and payments on the other. The account is vague and unbusiness-like in the extreme. It is, however, sworn to both by M'Meekin and by Taylor, his co-trustee, that cash was advanced to the Company from the Broadbent trust, and, of course, after it was registered; and I must, for present purposes, hold that at the date of the issue of the two debentures amounting to £11,000, there was something due by the Company to the Broadbent trustees. How much might have to be matter of account. I have, therefore, to consider the question of priorities on the basis that to some extent the two debentures were, or may have been, for value, that is to secure a debt actually due to the Broadbent trustees. The liquidator in his statement of affairs presented 8th March, 1898, returned the trustees of Broadbent as creditors fully secured by debenture for £11,000. He has explained that he did not then know or go fully into the facts; and, indeed, implies that he was misled, to

use a mild phrase, into this position, and that he knows more about it now.

Coming to the time in question, there is no question that the bank took the first issue of debentures for £23,000 in perfect good faith, and that they are first in point of security. Now after the issue of those debentures, what was the position of M'Meekin? He was, first, the Company. He was (as I assume in his favour), secondly, a creditor of the Company for £11,000 or so. He was, thirdly, a trustee in respect of that £11,000 to the Broadbent family, and a defaulting trustee, liable to be compelled to make good his breach of trust by civil process and by the peculiar jurisdiction exercised by this Court, if not by process of a different character. There can be no doubt but that in April, 1897, he must have known, or suspected, that the Company was pressed for money, even if not about to fail. I presume he had no means save such as were embarked in the business. At any rate his only hope of keeping the Broadbents safe was by procuring, what they had not before, a charge upon the assets of the Cogry Company. Accordingly he issued to himself (for his co-trustee, Taylor, appears to have been a cipher in this transaction) the two debentures in question. I say, *he* issued them; for although two of his sons signed them as directors, it was he who did the whole thing. Thus he was the grantor and grantee, mortgagor and mortgagee, at once.

In a way it is difficult not to feel a certain sympathy—not with him, but with those who depended upon what he did, and whose only hope of payment, so far as he is concerned, is through the enforcement of this claim against the Company. There are, however, other innocent persons to be considered.

Then comes the pledge of title-deeds to the bank. It was contended that the bank manager ought to have asked whether any further debenture had been issued since 1st April; especially as the articles of association and the form of the bank's debentures gave intimation that such might be in existence. The form of the debentures would indicate that, I think. I have here a copy of one of the first series issued to the bank. It is a mortgage debenture for £1000, "having first priority," and it states that

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"the said principal sum is part of a sum not exceeding in the whole £23,000, issued or issuable in like debentures, and which shall have equal priorities among themselves, but absolute priority over any future issue of debentures."

It does not appear that the bank searched the register of mortgages, nor that it would have done them any good if they had. On the other hand, it is said for the bank that they had no notice whatever of the debentures to the Broadbent trustees when they took the title-deeds on the 28th May; and this I thoroughly believe. It is not denied, and, of course, the facts speak for themselves. The bank would not have given further advances on deposit of title-deeds, had they known of the debentures.

As between the Broadbent debentures and the bank's equitable mortgage, I do not think there would be much difficulty in deciding, if the trustees who took the debentures were beneficial owners of them, and if the bank had had no prior debentures.

Taking the last-mentioned point first, Does it affect the question?

The way it is used is this. M'Meekin and Taylor say it is true we did not ask for or obtain the title-deeds when we took our debentures. Equally, no doubt, it may be negligence for debenture holders not to do so. In this case, however, the bank did not get up the title-deeds on the 1st April, so that the bank, at least, cannot say the omission was negligence. I fail to follow this argument. Assuming that it was a negligent omission on the part of the bank on the 1st April, the consequences of the omission were only that the Company was left in the possession of the deeds, and so placed in a position to commit a fraud by improperly dealing with them. That is all. And if the Company had dealt with the deeds fraudulently by depositing them with some other person not affected with notice, and otherwise acting with *bona fides*, the bank on well-known principles would have lost its priority. But no such question arises here. It is a mistake to suppose that there is any arbitrary or magical force in the neglect to get up title-deeds. The effect is simply that if title-deeds are negligently left in the hands of the mortgagee, who by means of

them is enabled to commit a fraud, in virtue of the semblance of an ownership which he does not possess, the loss shall fall upon the man who by his *laches* enables the fraud to be committed. Here no such question arises as to the bank's debentures; for though M'Meekin was permitted to hold the deeds without question, they were not used to defraud anybody.

But coming to the case as between the Broadbent debentures and the equitable mortgage which must be treated very much as if there had been no prior charge to the bank, the debentures of the 16th April are prior in date to the deposit of 28th May; and both are equitable securities. It is obvious that unless the equity under the later transaction is a better equity than that under the earlier, the chronological priority must prevail. The leading case upon this subject is *Rice* v. *Rice* (1).

I quote a passage (p. 77) from the judgment in that case which has always been looked on as one of great authority on this subject. It is as follows:—"What is the rule of a Court of Equity for determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form:—'As between persons having only equitable interests, *qui prior est tempore potior est jure*.' This is an incorrect statement of the rule; for that proposition is far from being universally true. In fact, not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of practically the same nature, and in that respect precisely equal; as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it.

"Another form of stating the rule is this:—'As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure*.' This form of stating the rule is not so obviously incorrect as the former. And yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the

(1) 2 Drew. 73.

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term 'equity'? For example, when we say that A has a better equity than B, what is meant by that? It means only that, according to those principles of right and justice which a Court of Equity recognises and acts upon, it will prefer A to B, and will interfere to enforce the rights of A as against B, and therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a Court of Equity would altogether refuse to lend its assistance to either party as against the other. If the Court will interfere to enforce the right of one against the other on any ground whatever, say, on the ground of priority of time, how can it be said that the equities of the two are equal; *i.e.* in other words, how can it be said that the one has no better right to call for the interference of a Court of Equity than the other? To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this:—'As between persons having only equitable interests, if their equities are *in all other respects* equal, priority of time gives the better equity, or *qui prior est tempore potior est jure.*' I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this; that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; *i.e.* that a Court of Equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all other respects equal: and that if the one has on other grounds a better equity than the other, priority of time is immaterial."

And, again, the Vice-Chancellor says at page 83:—"Indeed, it appears to me that in all cases of contest between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, everything seems in favour of the defendant the equitable mortgagee. The vendors when they sold the estate chose to leave part of the purchase-money unpaid; and yet executed

and delivered to the purchaser a conveyance, by which they declared in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase-money had been duly paid. They might still have required that the title deeds should remain in their custody, with a memorandum by way of equitable mortgage as a security for the unpaid purchase-money, and if they had done so they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus, they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser in mortgaging the estate by the deposit of the deeds has done the vendors any wrong, for he has only done that which the vendors authorised and enabled him to do. The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect by their acts assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity."

Thus, in every case the question is whether all the circumstances connected with the equity conferred by the latter instrument or transaction are of so much a higher sort and degree, as to oust the application of the rule of mere temporal priority.

In the present case, I must consider the question first, as if M'Meekin and Taylor were themselves the persons interested; postponing for the present the position and rights of their *cestuis que trustent*.

Treating the matter thus, it does not admit of one moment's doubt. M'Meekin was managing the whole of these transactions by the authority, express or implied, of Taylor; and for both. He, as chairman of directors, and managing-director, and chief shareholder, of the Cogry Company, in fact, as the Cogry Company, issued to himself and Taylor these two debentures, amounting to £11,000. That may have been or may not have been a transaction which it is possible to support. It was done, however, without the knowledge of the bank, who up to that date (the 16th

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April) had no right to interfere. But when on the 28th May, M'Meekin, knowing of the obligation to the bank, under the letter of the 1st April, went to Mr. Whelan taking the Company's deeds with him, and obtained a further overdraft on the security of the deposit without declaring that he had in the meantime for his own benefit placed an additional charge of £11,000 on the security, I believe no honest man could say that he was not guilty of a fraudulent suppression. It may be that, if the bank and he had been strangers, the rule *caveat emptor* might apply, though I do not mean to imply that it would. There was no positive affirmance of an untruth. The bank made no inquiry. But I am quite satisfied that that was not because they desired to avoid inquiry, fearing that it might reveal what it was more convenient not to have known, but only because they trusted M'Meekin, and never for a moment imagined that he would be guilty of a fraud of this sort. When a man goes with his title-deeds to a bank and asks for an advance, no doubt the bank, if well advised, will investigate the title, and procure searches before parting with its money. But here the bank had had its £23,000 debentures a few weeks before. The Company (that is M'Meekin) came with the deeds for a further advance. Was the bank to imagine that in the meantime the security was diminished by £11,000 in favour of the Company itself; or, of M'Meekin, who was using the Company for his own purposes? Even if the intervening security had been created in favour of a stranger, I am of opinion that, under the circumstances, it would have been the duty of M'Meekin to have disclosed it to the bank; for their relations were so close and delicate—banker and customer, mortgagor and mortgagee, as well as mere borrower and lender—that it might almost be said the position was one demanding *uberrima fides*. Without going so far, however, I am clearly of opinion that that which is enough for this as for most cases, common honesty, required that M'Meekin should disclose the truth to the bank. His use of the title deeds, under such circumstances, was an assertion that the title to the lands was not incumbered further than the bank knew. The bank was entitled to treat him as an honest man, and was not bound, under the circumstances, to make any special inquiries, having in fact no suspicion that he was acting otherwise than fairly and honour-

ably. It is here that the question of the right to the deeds comes in. M'Meekin, the creditor, ought to have got up the deeds from M'Meekin the debtor (for that is the substance of it), or have seen them accounted for on the 16th April; and he did not. He kept them himself, and subsequently used them to get money from the bank. The dilemma thus is complete. When he used the deeds to defraud the bank, he did so either as having got up the deeds, that is, as M'Meekin and Taylor; or as M'Meekin the Cogry Company, who retained the deeds through the negligence or connivance of M'Meekin and Taylor. I have already disposed of the argument that the conduct of the bank in regard to their first charge precludes them from setting up the case that there was negligence on the part of the secured debenture-holders in regard to the deeds. If M'Meekin, the director, could have been shown to have used the deeds to defraud M'Meekin and Taylor; that is, if M'Meekin had used them to defraud himself by untruly representing to himself that he was the owner of the property, the question of the deeds would have more importance; but the suggestion is too absurd. It is the bank that *has* the deeds. The neglect of M'Meekin and Taylor in not getting and keeping them is not less because the bank was negligent before; because M'Meekin and Taylor (through M'Meekin) knew all about that. It seems difficult to deal with this matter as one of neglect. It is one in which much more than neglect, that which this Court regards as positive fraud, exists. But on the question of neglect how does the law stand?

In the case of the *Bushmills Distillery Company* (1) in this country where the bank had actual notice of the debentures in question, and of the nature of the transactions (pp. 328, 9), the facts are so dissimilar that the case affords little assistance in dealing with the present. No case has been found in which the conditions were precisely similar to these before me in this respect, that the controversy arises between incumbrances numbers 2 and 3, in order of date, there being a prior charge, No. 1, vested in the owner of No. 3. I have dealt with this circumstance, and shown that it really makes no difference in the present case. But if it do

(1) [1896] 1 I. R. 301.

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not make a difference, then the decision of Romer, J., *In re Castell & Brown, Limited* (1), is directly in point. Indeed the present is a much clearer case, for there there was no fraud.

In that case Castell & Brown, Limited, was incorporated in 1884 under the Companies Acts, with power under its articles to borrow money and issue debentures, as security therefor, charged upon the property and rights of the Company both present and future, including its uncalled capital. The Company issued a series of debentures charged upon all its property present and future. In July, 1892, two of the directors called at the Company's bankers, the Union Bank of London, and asked for permission to overdraw the Company's account. They brought with them the title deeds of some of the Company's property, which were left with the bank as security; the bank manager prepared the usual memorandum of agreement on deposit, which was subsequently brought back to him sealed with the Company's seal, signed by two of the directors and counter-signed by the secretary. The bank manager had no notice of the existence of the debentures and made no inquiries. In August, 1895, further pecuniary assistance was required from the Union Bank, and a fresh memorandum of deposit was sealed and signed as before, the title deeds deposited in July, 1892, remaining all the time in the custody of the bank. No inquiries were made when this fresh memorandum was executed, and the bank manager had no notice of the existence of the debentures. Under these circumstances the question of priority arose between these different classes of securities. Romer, J., says (p. 319):—"This is a question of priority between two equitable incumbrancers. The debentures are prior in date, but the Union Bank, at the time of its charges, had no notice, express or implied, of the prior incumbrance, and, having obtained possession of the title deeds, claims priority under the circumstances of the case. If the equities of the two incumbrancers are in other respects equal, then of course priority depends upon the dates of the charges. But the question is, whether under the circumstances of this case the bank has not the better equity so as to entitle it to priority." They had made no inquiry

(1) [1898] 1 Ch. 315.

in reference to statutory mortgages or anything else. "Now," he says, "as between equitable incumbrancers in determining priority, the possession of the deeds has always been treated as a circumstance of great importance. And, indeed, in some of the numerous cases which show this, there are observations of the Judges who decided them which go very far." Then he refers to the judgment of Vice-Chancellor Kindersley in *Rice* v. *Rice* (1). He goes on (p. 320):—In the first place I cannot hold that there was any negligence on the part of the bank. When making its advances to Castell & Brown, Limited (which I will hereafter call the Company), it found the Company in possession of the deeds in question, and apparently able, as unincumbered owner, to charge the property. The Company purported as such unincumbered owner to give a charge to the bank, and I think the bank was, under the circumstances, entitled to rely upon obtaining a charge free from incumbrance. It is suggested on behalf of the debenture holders that the bank ought to have made some special inquiries of the Company. But it is not suggested that the bank wilfully abstained from making inquiries, and as the bank had no reason to suppose that the Company was not fully able to give a valid first charge, and found the Company in possession of the deeds, which showed no incumbrance, I think the bank was not bound to make any special inquiry. It is said on behalf of the debenture holders that it is so common for companies to issue debentures that the bank ought to have assumed that there were some in this case, or at any rate to have specially inquired about debentures." That seems to put the decision on the exact footing of the present case, and he says—"Such a contention appears to me unreasonable. I therefore hold that there was no negligence on the part of the bank."

Mercantile life could not proceed if banks were at every step to suspect their customers of trickery. I am satisfied it never occurred to Mr. Whelan for a moment that M'Meekin was trying to perpetrate a deceit upon him. If, then, this was a case between M'Meekin personally, or M'Meekin and Taylor (which is the same

(1) 2 Drew. 81.

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thing) and the bank, it would be a scandal and disgrace to our law if it admitted of a doubt. The bank must have priority over this £11,000.

But the part of the case which has given me most pain, and in regard to which I have felt the only difficulty, is that innocent persons are concerned, some of them minors, all unconsciously involved in this unhappy position without fault of their own. Are they to suffer by the bad faith of their trustee?

It unfortunately happens that one of the disadvantages of our system of trusts is, that, for many purposes, the interests of innocent persons may be jeopardized and betrayed by those whose duty it is to guard them, at all hazards and in all difficulties. That is why it is so important to select an honourable and upright, as well as an intelligent and capable man for the office of trustee. If the selection is unfortunate, so may be the results.

During the course of the argument I referred to the *dictum* of Lord Justice Fitz Gibbon on the subject in *Ffrench's Estate* (1), at p. 319. He says:—"In that state of affairs, what is the true position, in equity, of the persons now claiming this trust fund? I think that where *cestuis que trustent* are represented by trustees, and are acting, or must claim, through trustees in whom the legal estate is or ought to be vested, and where innocent and independent third parties have been misled or defrauded by the conduct, or through the *laches*, of those trustees, such *cestuis que trustent* cannot be better off, in equity, than if they had been *sui juris* and had themselves acted as their trustees did. It cannot deteriorate the equity of the opposite party, when founded on *laches* or misconduct exposing him to loss or fraud, that the person whose acts have had the injurious effect, was a trustee and not a beneficial owner."

In my opinion, this is a sound and accurate statement of the law. I do not lay any stress upon my own observations in the case at p. 311. But I may repeat them here for what they are worth:—"In my opinion, in a case like the present, the delay or

(1) 21 L. R. Ir. 283, 295.

neglect of the trustees in not taking steps to enforce their rights against the lands must be held to bind their *cestuis que trustent*, whose remedy (if any) would be against the trustees, and their estates."

And Barry, L.J., says (p. 337):—"It is the duty of such persons to select careful and honest trustees, and if they fail in that duty, and select those who are careless or dishonest, and either the children or innocent strangers must be defrauded by the acts of such trustees, the loss should fall on those whose agents chose the faulty trustees rather than on the strangers, assuming of course the latter to be guilty of no negligence or default."

And Mr. Law cited *Lloyd's Banking Company* v. *Jones* (1), which is to exactly the same effect.

In *Ffrench's Estate* (2) nearly all the cases on this subject, including *Pillgrem* v. *Pillgrem* (3) were reviewed and considered.

I am very clearly of opinion that the equitable lien of the bank, by deposit of the title deeds, is founded upon an equity far superior to that acquired by the creation of the debentures of 16th April.

There is another question, however, which goes further than this. The liquidator argues that the £11,000 debentures are wholly void. He admits that he recognised them in the balance sheet, or statement of affairs, prepared by him in 1898; but says that was in ignorance of facts.

As to this question, I shall not now decide it. It may not arise. If it does, that is, if the sale of the premises leaves a surplus, it will most properly stand over till that fact is ascertained. And I admit that it may be susceptible of considerations which ought to be brought forward on more complete materials than are now before me. I mean that I should like to have it discussed on *viva voce* examination and cross-examination of witnesses, and not on mere affidavits. The decision that the deposit of 28th May is to have priority over the debentures of 16th April, does not necessarily involve that the debentures are wholly void, even as to

(1) 29 Ch. D. 221. (1) 21 L. R. Ir. 283, 295.
(3) 18 Ch. D. 93.

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property comprised in them, and not comprised in the lien founded upon the title deeds of lands merely. The genuineness of the transactions has been impeached *in toto*, as well as the right of the principal director to pledge the assets of the Company for what is charged to be his own debt.

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The further hearing of the motion, having been adjourned by the order of December 14th, 1898, came on upon February 2nd, 1899. William M'Meekin, Samuel H. Broadbent, and seven other witnesses were examined on that and following days, and the same counsel appeared. The substance and effect of the evidence is sufficiently stated in the judgment of the Master of the Rolls.

It was contended on behalf of the applicants that the money of the Broadbent minors had been put into the business by M'Meekin, their trustee, and that the Company through him had notice of the trust, and that its assets were liable, and that therefore the debentures were issued for consideration.

It was contended on behalf of the liquidator that the money of the minors had not, in fact, been put into the business, but had been spent by M'Meekin in gambling Stock Exchange transactions, and that, if any money had been put into the business, it was only a private debt of M'Meekin to the minors, and that his liabilities had not been taken over by the Company, and that it had no notice of the trust or of the issue of the debentures, and that therefore they were issued without consideration, and were not binding on the assets of the Company as against creditors.

The following authorities were cited:—*Pennell* v. *Deffell* (1); *Middleton* v. *Pollock*, *Ex parte Elliott* (2); *Re Hallett* (3);

(1) 4 De G. M. & G. 372. (2) 2 Ch. D. 104.
(3) 13 Ch. D. 696.

Hancock v. *Smith* (1); *Reid* v. *Rigby & Co.* (2); *In re Lough Neagh Ship Company, Ex parte Workman* (3); *Saloman* v. *Saloman & Co.* (4).

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THE MASTER OF THE ROLLS:—

In this case of the Bank of Ireland against the Cogry Flax Spinning Company, I had occasion recently on another application to consider the facts. The question now before me is not exactly the same as that which was decided on the former occasion. The application brought forward by the Bank of Ireland, which I then decided, was in the alternative—either that their debentures to the extent of £23,000 should be declared to be in priority, together with their charge by equitable deposit of title-deeds, over the £11,000 debentures, which are the subject of the present application, or that these £11,000 debentures should be declared void. At the time I was satisfied, and I am more satisfied now that the case was not ripe for the decision of the latter point—namely, as to the question of the validity or invalidity of the £11,000 debentures. I therefore decided upon the materials before me, on a question merely of priority, declaring that the bank's lien, by virtue of these deposited title-deeds, had priority over the £11,000 debentures now in controversy, although later in point of date. That was all that was then decided.

The question now is brought forward by this claim to have the £11,000 debentures declared a valid charge. All parties have submitted to the jurisdiction in this case on the whole matter regarding the debentures.

Assuming, then, a knowledge of the facts which I have stated in my former judgment, I have to consider the question as regards the validity of the debentures for £11,000 which were issued to Mr. M'Meekin and Mr. Taylor, as co-trustees, no doubt in trust for the Broadbent family. The money in question—that is, the money that is stated to constitute the consideration for these debentures was taken, chiefly in the year 1892, by Mr. M'Meekin,

(1) 41 Ch. D. 456.
(2) [1894] 2 Q. B. 40.
(3) [1895] 1 I. R. 533.
(4) [1897] A. C. 22.

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from his trust account—that is from the Broadbent family—without the knowledge of any person interested. That appears as an inference of fact from the whole of the proceedings in the case; and there can be no doubt about it. The Broadbent trust funds were kept by him in a separate account in the Belfast Bank, and the money was drawn by him by cheques on that account, and drawn chiefly in 1892, without any consent or without the knowledge of any person interested. Most of the Broadbent family who were entitled to the money were infants at the time. One was of age, and no communication appears to have been made to her or them. No acknowledgment in writing or otherwise, so far as I am aware, or so far as has been proved, was given to them or to anyone on their behalf, indicating that this trust money had been made away with by the trustee; or rather, from his point of view, if his case were correct, that it was taken for the purpose of investing in his own business and his own mill. The mode in which it was taken was also of the most peculiar character. His case now is that the money was withdrawn from his trust account in the way of a loan, to be employed by him on the security of the business of his own firm. If so, one would expect to find that the utmost openness and frankness had been displayed by him in reference to dealings with that money of the infants for which their trustee was responsible. No doubt he had very large powers of investment, and no doubt, even the most honest trustee might possibly suppose, under the circumstances of the case, that he would be authorised in using this money in the way he did. I am willing to assume that; but how did he actually act? He drew the fund out in cheques, for round sums, as a rule of £500 or £1000. These cheques upon the account standing in his own name he made payable in almost every case to a Mr. M'Clery, a gentleman who was examined before me, and who was at the time his bookkeeper. That was in itself peculiar; but what was done with these cheques? Instead of their being lodged, as every business man knows would be the rule if the transaction were proper, to the credit of his own business account in the Bank of Ireland, Mr. M'Clery had positive instructions from him in each case where there was a cheque upon the Belfast Bank account, in other words, the Broadbent account, to go to the bank and get the money

in notes; and having got it in notes, these notes were applied or disposed of either by lodging them in the bank or by paying current bills or the like. Now, to any business man, this transaction would, to say the least of it, present a suspicious appearance. If it had been a regular transaction those cheques would have been lodged to the credit of his own account; but that standing order to go and cash the cheques indicates of course a guilty knowledge upon his part; and in the second place, that if the cheques had been lodged in the Bank of Ireland, it would have led to an inquiry at once, and the bank would immediately have ascertained that he, their customer, was lodging to his own credit moneys that belonged to his trust account in the Belfast Bank, and that would have put a stop to the whole affair. Another circumstance, in considering the transaction, was this, that no proper books of account were kept, or that if kept they have been made away with. The business was carried on, so far as the manufacturing branch was concerned, at Cogry, in the central part of the county of Antrim, and the mercantile office was in Bedford-street, Belfast. Mr. M'Meekin states that at the time of the constitution of the Company in 1894, he had got at Cogry certain books of account which would have disclosed these transactions. The Company was formed in 1894, and those books of account have disappeared. Who is responsible for that? It is proved, and not denied by M'Meekin himself, that he had personal custody and control of these books. They have been either lost or made away with; and, for whatever happened, either the loss of the books, or the making away with them, he is of course directly responsible. I may say that, sitting as a juror and treating the questions of fact as matters of common sense, in a case where there has been no destruction of property by fire, no removal of it by burglary, nothing to account for the disappearance of those mercantile books, I am unable to attach credence to the statement that they have simply disappeared. I may illustrate it in this way, without deciding who actually took the books or under what circumstances, which are matters about which I can know nothing—if this case were one in another branch of the High Court Mr. M'Meekin's answers would have been treated and properly treated as "unsatisfactory."

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Now, what was done with the large sums of money which he withdrew? The debentures represent £11,000. Supposing that the whole of that money was not actually abstracted by him—and there is some reason to suppose that it was not—supposing, however, that it was £11,000 in all, what became of it? The evidence satisfies me with certainty that the money was spent by him in Stock Exchange gambling. He was at the head of this concern floated in 1894. It was a one-man Company, as I have said on the previous occasion, if ever there was one; he was managing director, sole proprietor, vendor to the Company, and manager after the sale to the Company. The capital was represented as being £100,000. It is not matter of speculation, it is matter of proof, that during the time when he was abstracting these moneys from his trust he was also losing sums almost identical in Stock Exchange speculative gambling transactions. The money was, in fact, simply passed through the books of the concern. No doubt it was sometimes used in making payments on account of the business, and thus was intended to appear to have been really used in it; but M'Meekin paid his gambling differences and appropriated other sums out of the money of the firm, and thus it was the Broadbent money which in reality was so applied. He stated that his "private drawings" in 1892—the most important year for our consideration—were £7560. Now, he was not spending that in personal expenses. It is impossible to imagine that M'Meekin would steal the trust-money in order really and *bona fide* to invest it in the mill, and also at the same time take out the mill money in order to gamble with it on the Stock Exchange. As bearing on the question of what really became of the Broadbent money, I was struck with one piece of evidence, to which I attach credence. It was proved by two unimpeachable witnesses, although denied by M'Meekin, that before the failure of the Company a question arose as to the preparation of a balance-sheet; and in reference to no interest appearing on one of these accounts a suggestion was made by M'Meekin that, inasmuch as his private account owed the Company between £7000 and £8000, and inasmuch as the firm owed the Broadbent trust an almost equal sum, it therefore was unnecessary to charge interest, to debit it on the one account

and credit it on the other, because it was as broad as it was long, and would balance itself. That would be a very convenient way of doing business if there were cross accounts between the same parties, but it is an impossible way of doing business unless there are such cross accounts; and therefore by that suggestion—which I believe was made—he as a business man committed himself beyond all question to this, that the two accounts were substantially the same. But, if there was any doubt on the materials before me as matter of proof as to the truth and substance of the matter, the conduct of M'Meekin in this case confirms this belief. He was examined here on more than one occasion, and he swore positively that he had no Stock Exchange transactions at all in the year 1892. It appears that he did business not through any local stockbroker, but direct through a firm of stockbrokers in London, Messrs. M'Kenna. When interrogated about these Stock Exchange transactions he produced a number of statements of account from the M'Kennas for the years 1891, 1894, 1895, and 1896, and stated that he had none for the year 1892, because there were no transactions, and that as regarded the year 1893 there were only one at the end of that year. These statements of account purported usually to be carried on from account to account fortnightly. On looking at the documents I found that the account he produced for the year 1893 commenced with a balance from last account. It was therefore absolutely certain, no matter what the balance was, that it was not the starting of a new account, but the continuation of an old one. He stated that he had produced all the documents he had received from the M'Kennas, and an adjournment took place. It was thrown out by me at the time that there could be no difficulty whatever in procuring a complete set of accounts from the M'Kennas, because, apart from the known habit of every stockbroker of keeping his ledgers right, there was positive proof that the M'Kennas had forthcoming the accounts for the year 1891, and there could be no difficulty in getting them all. Accordingly, after the adjournment, with an apology for his forgetfulness, Mr. M'Meekin produced a bundle of additional accounts from the M'Kennas extending over almost every fortnight of the year 1892. Where had he got them? Had he got them since? He had to

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admit that he had not—that he had had them in his custody the whole time. He had got them, he said, it might be two months or six weeks or a fortnight ago. A more scandalous attempt to deceive it is impossible to imagine. He had the whole of the documents before him, and he was a business man at the head of large mercantile affairs. Now, those accounts show that during the year 1892, when he stated that he had no Stock Exchange transactions, and consequently no losses—that that statement is absolutely untrue, and that he was concealing it here for a definite and distinct purpose.

Now, what is the legal results of these facts? I have felt much anxiety in making up my mind about this case, not merely or chiefly on account of the considerable amount of money involved, but from regard to the fact that the parties concerned on both sides are innocent. Of course I am not referring to M'Meekin. On the one hand are the Broadbent family, who were nearly all minors at the time, ignorant of their rights or wrongs, and on the other the trade creditors of the Company. M'Meekin was the sole trustee for the Broadbents in 1894, when he appointed a Mr. Taylor to act with him. Mr. S. M. Broadbent, who was in the office of the Company, asked for an account, and was shown it too late—at Easter, 1898. I drew attention to the fact that he was placed in a very painful position. This young man's money had been made away with in this way, and his only chance of getting the money back was by showing that what was done was done by M'Meekin with the approval of the family. It was the only position by which he could sustain his case. Who was Taylor, the other trustee? He was a young man, and a relative of the family, who lived in Liverpool. Why should he be appointed trustee of a fund in Belfast? Well, that is not much in itself, but as an indication of what was intended by M'Meekin it is not devoid of weight that he was a person who lived in Liverpool. I asked M'Meekin what Taylor was. He said he was a mercantile man—engaged in business. I asked him what business he was engaged in, and he said he was a commission agent. I then asked him what sort of a commission agent he was, and he replied that Taylor sold several things. It transpired that he was really an agent soliciting orders for peat moss litter—a most respectable calling, but hardly

that of a person who would be selected as a *bona fide* trustee to exercise control with M'Meekin in respect of these large funds that were passing through M'Meekin's hands. But how was he dealt with as trustee? The bank account, in which large sums were paid in to the credit of the family, stood, until the appointment of Taylor, in the name of M'Meekin. It ought to have been then put into the names of Taylor and M'Meekin, if the appointment of Taylor was anything other than a sham. This trust was not like a business in which payments had to be made from day to day; it was a trust in reference to which payments were few and far between, and in which the delay of a few hours' post could make no possible difference. Yet the bank account remained in the name of M'Meekin, so that he retained the same absolute control over the trust property that he did before. It was represented to me that Taylor was an independent trustee, and that as an independent trustee he had concurred in the subsequent investment of trust funds in the Company. Now, I greatly doubted it; all the circumstances point the other way. On the first day on which this branch of the case was at hearing Taylor, it was stated, and I am sure truly, attended from Liverpool. I do not question that he did, but it was known to everybody that at a hearing of this sort he might not be examined at all on the first day; and he found his engagements in connection with the industry he pursued in Liverpool so pressing that he went away the same night, and never came back during the hearing of the case. No application was made to me to fix a day for his convenience, when the business of the peat moss litter trade would enable him to attend in Dublin. He disappeared out of the case, and has given no evidence except so far as affidavits are concerned. Thus, after the appointment of Taylor, just as before, the minors were absolutely at the mercy of M'Meekin.

But what are the legal rights flowing from these things? The breach of trust by M'Meekin constituted a debt by him, and, besides, it was the right of the *cestuis que trustent* to follow the money into every investment made by M'Meekin: *Pennell* v. *Deffell* (1); *Re Hallett* (2). If he used it in buying steam engines

(1) 4 De G. M. & G. 372. (2) 13 Ch. D. 696.

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or spinning frames, in enlarging the mill or building a chimney, there would have been an equity in the Broadbents to come to this Court and obtain a charge on the property for the fund to the extent of the entire interest he possessed. I have already given my reasons for holding that the trust fund was in reality spent in gambling in Milwaukee bonds, and so forth. If so, it would be into these investments or dealings alone that the fund could be followed.

But, supposing the facts were otherwise, on this hypothesis it remained in the machinery and buildings until 1894; that is to say, the Broadbents would then have had a right to follow it. In 1894, however, the Company now in liquidation was formed. There is no question but that it was legally constituted. It was a "one-man" Company; but since the decision in the House of Lords in *Saloman* v. *Saloman & Co.* (1), that circumstance can not be held to affect the validity of its registration. It was a separate entity, having a distinct existence. To the extent to which M'Meekin acquired any interest in the Company—that is, to the extent of the fully paid up shares, or shares meant so to be, it may be that his *cestuis que trustent* would still retain their right to trace this fund, if they could do so.

But the rights and property which the Company acquired must depend on the terms of their purchase. Their purchase was under a deed of agreement dated 29th June, 1894, and the Company was formed for the purpose of taking over the business of M'Meekin, and it was registered and incorporated. That agreement provided that the vendor was to convey to the Company all the leasehold messuages and existing rights and appurtenances, mills, buildings, machinery, boilers, &c., together with the benefit of all contracts, engagements, rights, and privileges to which the vendor might be entitled, the goodwill of the business, trademarks, patents, licences, &c. It provided also that the title to the vendor's premises should be admitted, and the purchase completed forthwith. It was contended upon that agreement that the debts which were due by the business before the sale became debts of the Company afterwards. Now there is no mention of the debts due by M'Meekin.

(1) [1897] A. C. 22.

The property is not sold subject to his liabilities, and no one buying a business as a going concern would suppose that he would become liable for the vendor's breaches of trust or embezzlements. I was at first inclined (I admit) to try to spell out of the language of the deed an intention to transfer liabilities. Even if this were its meaning, it would be hard to press it beyond ordinary current trade liabilities at furthest; and this liability to make good the breach of a private trust could not be classed as such. No balance-sheet was prepared on the occasion. That which has been used is a document prepared by the accountants employed pending the proceedings in this action, and so far as the present case is concerned it depends upon an entry in the private ledger made by M'Meekin, no one knows exactly when, purporting to have been brought forward from a book which has been lost, suppressed, or destroyed. It is perfectly clear that as a debt this liability remains with M'Meekin, and never became the debt of the Company. I am of course speaking of the great portion of the demand which was in existence just prior to the formation of the Company. He took from his trust in 1891, £500; in 1892, which was a fruitful year, he took £500, £1000, £2000, £1000, and £1000, making in all £6000; and £2500, making £8500 altogether, of which £8000 was abstracted in 1892. Subsequent removals and withdrawals amounted to £1000 in 1894, and £2442 in 1895. There were subsequent withdrawals after the constitution of the Company in 1894, and that was relied upon as standing upon a different footing. But it turns out that the moneys that were withdrawn since 1894 are much less than the moneys that were paid out to the Broadbent family in the same period, because since March 6th, 1894, the payments out amounted to £3,281 15*s.* 4*d.*, while the money received by the Company since 1894 fell short of that amount by the sum of £1019 5*s.* 4*d.*; so that since 1894 the Broadbent family got more money out of the concern than they paid in during that time. The only way Mr. Samuels met this part of the case was by arguing that the payment out of the Company's funds since 1894 (all of course made by M'Meekin), ought to be attributed to the earlier liability. That would be so if there was an earlier liability of the Company, but if there was

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none, then such attribution cannot take place. I sought to distinguish the sum of £1500 stated by M'Meekin to have been left in the business by Broadbent, the testator, from the other portions of his assets. There is no doubt this sum was used in the business, nor any doubt that it ought to have been called up by M'Meekin, but was not. It was, however, no more than a debt, or a part of the trust fund misapplied, and the contract of sale of the business made no provision for its being paid or taken over by the Company.

But the main contention of counsel for the Broadbent family was that the right to follow the trust fund misapplied into the property of M'Meekin, extended further than that, and that the Company was affected by notice of the trust, and therefore held the property subject to it, or at least to the obligation of converting the right to follow the fund into an actual charge, such as was created by the debentures in question.

It would be strange if the Company, having purchased the property free from, and unaffected by, the debts of the old firm, should yet be held to take it, subject to a trust to pay the same debts, or to a lien or quasi-lien to secure them. But, however, that may be, I am clearly of opinion that there was no notice to the Company whatever. Of course there was notice of everything by M'Meekin as trustee for the Broadbent fund, to M'Meekin the chairman of the Company, but the chairman is not the Company. It is true we hear little of any meetings of directors, and nothing of meetings of the Company; but the Company is a distinct entity, and no authority was quoted for the proposition that notice to a director is notice to a Company. The consequences would be terrible to many an honest Company if that were so. The entries in the books were not shown to my satisfaction to have been made before the Company was incorporated; I mean the entries headed "Broadbent Trust." But even if they were, that would, in my opinion, fall short of notice of anything more than that M'Meekin owed money to the Broadbent family, a matter perfectly immaterial to the Company, which did not buy subject to M'Meekin's liabilities. That his interest in the Company would be bound is a perfectly different proposition. I put this as a test of the question of notice. There was nothing to

prevent M'Meekin selling his shares the day after the allotment. The purchaser would thus have been the substantial owner of the whole concern. Would M'Meekin's consciousness of having wronged his *cestuis que trustent* affect the purchaser, or his shares, or the Company which he owned? Clearly not. Yet if notice to him was notice to the Company, it would: for the notice existed, if at all, at the very moment of registration. No one (other than clerks) saw or cared for the books except M'Meekin himself, and I have no doubt he made the entries for the very purpose of carrying out his fraud. Neither in fact nor law was there any notice to affect the Company with the trust, and this apart from the question, whether any such trust could bind the Company under the circumstances, even if there were notice.

The result is that the debentures were issued without authority and without consideration, and they do not bind the assets as against the creditors.

Solicitor for the plaintiffs: *Edward H. de Moleyns.*
Solicitor for the applicants: *J. C. White.*
Solicitors for the liquidator: *Carson & M'Dowell.*

W. L.

V.-C. 1900.

In re LIGONIEL SPINNING COMPANY, Limited; Ex parte CONNOR.

Jan. 23. March 30.

Company—Shareholder—Petition for arrangement—Subsequent liquidation of Company—Liability for calls.

Where a shareholder in a Company presented a petition for an arrangement with his creditors, and subsequently, while the arrangement was still pending, the Company went into liquidation, and a call was made on the shares:—

Held, that the presentation of the petition being prior to the liquidation, the call was not a debt provable in the arrangement, and was, therefore, unaffected by it, and that consequently the shareholder's name should be retained on the list of contributories; but *secus* if the liquidation had preceded the presentation of the petition.

This matter came before the Court on a memorandum from the chief clerk to take the opinion of the Court upon the question, whether the name of Mr. C. C. Connor was rightly retained on the list of contributories to the Ligoniel Spinning Company, which on the 6th June, 1898, was ordered to be wound up.

Mr. Connor was the holder of 285 £10 shares in the Company, of which £7 10*s.* was paid up, leaving a liability of £2 10*s.* per share, which the liquidator was proceeding to enforce. Mr. Connor deposited in the year 1894, with the Bank of Ireland among other securities, the scrip of these shares to secure the bank in respect of certain loans made to him, and subsequently at the request of the bank signed a blank transfer of these shares. On the 25th May, 1894, the bank, by letter, gave the Company notice that they held these shares as collateral security for Mr. Connor's indebtedness to them; but the Company replied stating that they claimed a paramount lien on the shares under the articles of association for money due to them. On the 28th May, 1894, Mr. Connor presented a petition for an arrangement with his creditors, and carried a proposal which was subsequently amended, and which was agreed to by the bank and the Company.

The bank proved their debt in the arrangement matter, and valued the shares as well as the other securities held from

Mr. Connor at £60,000. The Company likewise proved in the arrangement matter their debt, the amount of their proof being £1946 2*s.* 11*d.* The followed note was put by them upon their proof under the heading, "particulars of security":—"The said Charles Cunningham Connor was the registered owner of 285 shares in the Ligoniel Spinning Company, Ltd., upon which the Company have a paramount lien under their articles of association for his liabilities to the Company. The Company value such security at the amount of their claim against the estate of the said Charles C. Connor." Both these proofs were admitted, but no dividend from Mr. Connor's estate was received by the Company or the bank.

Gordon, Q.C., for the applicant, Mr. Connor:—

The bank and the Company assented to the proposal made by Mr. Connor in the arrangement, and proved for the amount of their claims; they are therefore debarred from making Mr. Connor personally liable. The bank, having the certificates and transfer, informed the Company of this, but the Company claimed a paramount lien on the shares for the shareholder's debts, under clause 40 of the articles of association. Under the Companies Act of 1862, sect. 77, where a contributory becomes a bankrupt, before or after being placed on the list of contributories, his assignees are deemed to be in his place; and by sect. 75 of the same Act, if a contributory to a Company, which is being wound up, becomes a bankrupt, the liquidator may prove for calls due, and also in respect of future calls. A liability to pay calls is a debt not incapable of being ascertained, and is therefore provable in bankruptcy, whether the liquidation is prior or subsequent to the bankruptcy or arrangement: *In re the Mercantile Mutual Marine Insurance Association* (1). No doubt that case was decided under sect. 31 of the English Bankruptcy Act of 1869, and there is no corresponding section in the Irish Acts; but sects. 257 and 258 of the Irish Bankruptcy Act of 1857 are wide enough to make every conceivable liability provable against a bankrupt or

(1) 25 Ch. D. 415.

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In re Ligoniel Spinning Co. *Ex parte* Connor.

arranging debtor, and provide the means of ascertaining such liability. There is nothing to prevent the liability in the present case being estimated, and therefore the case falls within the principle of the English authority. It would be unreasonable, when all Mr. Connor's property has been vested in the trustees in the arrangement, to place him in his personal capacity on the list of contributories.

Matheson, Q.C., for the liquidator :—

Prior to the Act of 1869, it was decided in England that, if a shareholder, as here, has not become a contributory before his bankruptcy, that is to say, if the winding up does not precede the bankruptcy, the liability cannot be valued, and therefore the shareholder remains liable : *Financial Corporation* v. *Lawrence* (1) ; *Ex parte Pickering* (2) ; *Furdoonjee's Case* (3). So also, where a husband covenanted to pay an annuity to his wife, to cease in the event of future cohabitation by mutual consent, such annuity was held not to be provable : *Mudge* v. *Rowan* (4). The law in Ireland is similar to the law as it existed in England before 1869, and therefore these cases apply. The case of the *Mercantile Mutual Marine Insurance Association* (5) was decided under the special provisions of sect. 31 of the English Act of 1869, to which there is nothing similar in the Irish Acts.

Gordon, Q.C., in reply :—

The arrangement matter is still pending, and the liquidator can come in and prove at any stage, so long as the matter is open. The cases cited by Mr. Matheson are all English authorities, and sect. 31 of the Act of 1869 was inserted for the purpose of overruling them. It is fair to suppose that, inasmuch as no similar provision was introduced into the Irish Act of 1872, the Legislature deemed it unnecessary, owing to the different state of the law in Ireland.

(1) L. R. 4 C. P. 731.
(2) L. R. 4 Ch. App. 58.
(3) 3 Ch. D. 264.
(4) L. R. 3 Ex. 85.
(5) 25 Ch. D. 415.

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March 30.

The Vice-Chancellor:—

The question submitted to me from Chambers, on a memorandum of the Chief Clerk, is whether the name of Charles C. Connor should be continued on the list of contributories in respect of 285 shares standing in Connor's name, on which the sum of £7 10*s.* each had been called up and paid, leaving £2 10*s.* per share still unpaid. In the year 1894 Connor became an arranging debtor. He had previously deposited the certificates of these shares with the Bank of Ireland, as a security for prior advances made to him by the bank. Connor was also indebted to the Ligoniel Spinning Company in a large sum on a current account. The arrangement was duly carried out under the Act. The Ligoniel Spinning Company went into liquidation in the year 1898, and an order was made by me, dated the 6th June, 1898, for winding it up, under which the present proceeding is now pending at Chambers. The liquidator brought in the list of contributories, and included therein the name of Charles Connor, as a contributory for the sum due by him to the Company for the amount unpaid on the 285 shares.

The liquidator claims to have a lien on this for the sum due by Connor on his general account under the provisions of the articles of association. Mr. Connor contends that he is not liable and that his name should be removed from the list of contributories, on the ground that his liability was discharged by his arrangement with his creditors.

In order to arrive at a conclusion upon this question, it is necessary to consider what the state of the law in England was, before the passing of the English Bankruptcy Amendment Act of 1869. That Act does not extend to Ireland, and accordingly any subsequent English decisions on the subject now before me are not of importance. But there were some very important decisions in England shortly before the passing of the Act, which probably led to its being passed, and which show conclusively what was the law there before the Act, and consequently what the law in Ireland now is on the subject. There can be no doubt that a bankrupt or arranging debtor is not discharged from any liability, which could not be proved for in the bankruptcy or arrangement, and that such liability must be

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capable of valuation. A claim not capable of being valued is therefore not so discharged. The question then is, whether a liability to calls, not made at the time of the bankruptcy or arrangement, is capable of calculation. I confess my inability to understand how such a calculation could be made. It might, no doubt, be not only practicable but easy, in certain states of fact to do so; but what principle could be laid down as generally applicable I do not know. As, however, the tendency of judicial decisions was in favour of extending the power of Courts of Bankruptcy to all possible cases, it came to be held, that when the liability was to pay calls on shares not fully paid up, the continuance of liability depended on which was the earlier in point of time—the bankruptcy of the shareholder or the liquidation of the Company. It was decided that if the bankruptcy was the earlier the liability was incalculable, but if the winding up had begun before the bankruptcy, the liability was calculable, and was therefore provable, and that consequently the debtor was discharged. No doubt there are serious difficulties in one case that do not exist in the other. The possibility of proving for the debt must be determined as of the date of the bankruptcy or arrangement. When the winding up had not then taken place, or at least begun, there was the uncertainty whether the Company would ever be wound up. In the other case that uncertainty had become certain, and there remained only the uncertainty of the amount of the liability, which might in some way be estimated, though not then ascertained. I refer to the cases of *Ex parte Hastie*; *In re The General Estates Company* (1) and *The Financial Corporation* v. *Lawrence* (2), and also to the principle of decision in *Mudge* v. *Rowan* (3), as authorities for these propositions.

I am of opinion that in Ireland the law is, that where the bankruptcy of the debtor is prior to the winding up of the Company, the liability is incalculable, and is not discharged by the bankruptcy, but that when the winding up is prior to the bankruptcy, the liability is calculable and therefore provable, and is discharged.

(1) L. R. 4 Ch. App. 274. (2) L. R. 4 C. P. 731.
(3) L. R. 3 Ex. 85.

I accordingly hold that Mr. Connor must be retained on the list of contributories, and I affirm the ruling of the Chief Clerk.

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Solicitors for the applicant: *Carson & M'Dowell.*
Solicitor for the liquidator: *White.*

J. MAC M.

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Ross, J. 1900.

Jan. 20, 22. 24.

Appeal. Feb. 26, 27. March 1.

Landlord and tenant—Rent—Adjustment under Local Government Act, 1898 *—Buildings declared by Land Commission to be tenant's improvements—Poor-rate.*

The fact that the buildings on a holding have been declared by the Land Commission to be the tenant's improvements, does not prevent the tenant of an "existing tenancy" from making the deductions from his rent, in respect of such buildings, authorised by sect. 54, sub-sect. 1, of the Local Government Act, 1898.

THIS case came before Mr. Justice Ross, as Receiver Judge, on an application by the Receiver for direction as to allowances of rates under the Local Government Act to tenants in respect of buildings, if same have been claimed by the tenants as their improvements, and so awarded in the Pink Schedules to the orders of the Land Commission.

The facts appear fully from the judgment of Mr. Justice Ross.

Campbell, Q.C., and *James Little*, for the Receiver:—

Under 1 & 2 Vict. c. 56, lands and buildings are rateable hereditaments. The principle of assessment in the case of land is altered by 15 & 16 Vict. c. 63; therefore, buildings are a hereditament distinct from land, having a different basis of valuation: *Guardians of New Ross Union* v. *Byrne* (1). By sect. 74 of 1 & 2 Vict. c. 56, it is evident that the privilege of deduction is co-extensive with the liability to pay; and there is no right of

(1) 30 L. R. Ir. 160.

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deduction where the hereditament yields no rent. Until 1896 there was no machinery for finding out if the rent paid by a tenant issued out of the land or buildings. The agricultural grant only affects agricultural lands; and the landlord's liability to allow a deduction remains in so far as the rent is payable on the buildings. As to the argument that the rent issues out of the entire holding, this is not the case in the legal sense since the Act of 1881, as the rent does not issue out of the buildings, but out of the site; and the buildings are the rateable hereditament, not the site. The present question does not arise in the consideration of the law of ejectment.

Chaytor, for the trustees of the estate.

Matheson, Q.C., and *Powell*, for the tenant:—

"Liable" in sect. 74 of the 1 & 2 Vict. c. 56, means legally liable, in the sense that the liability can be enforced in a Court by action for rent or of ejectment. The Land Commission fix the rent upon the holding as a whole, and in ejectment the entire of the holding is recovered. Notwithstanding sect. 8 (9) of the Act of 1881, rent issues out of the buildings, as otherwise they could not be recovered in ejectment.

Jan. 24.

Ross, J.:—

In this case, in my capacity as Receiver Judge, I am asked to determine a question affecting a large number of landlords and tenants in Ireland. The question arises under the Local Government Act of 1898. The case is intended to be a test case: all parties submit to the jurisdiction of the Court.

The tenant, Patrick Golden, had a fair rent fixed on the 15th February, 1899; the old rent was £29 1*s.* 6*d.*, and it has been reduced to £27 15*s.* The valuation of the holding is £29, of which £26 10*s.* is on the lands, and £2 10*s.* on the buildings. In the Pink Schedule attached to the order, it appears that the buildings were erected by the tenant, and no rent has been put thereon by the Land Commission. In this state of circumstances it is contended, on behalf of the landlord, that the tenant is entitled to no deduction for the poor-rate on the buildings. The usual practice in such cases would be to direct the receiver to

proceed to have the matter decided by the ordinary Courts. If, however, the determination of this question be delayed, the administration of the Receiver side of this Court will be seriously interfered with. In a similar case (*Duggan's Estate* (1)) involving a question arising under the Local Government Act, I decided the question on argument here; and, on appeal from that decision, the opinion of the Court of Appeal was promptly and cheaply obtained, to the great advantage of the estates in this Court, and to the great advantage of the public. As their Lordships, so far as I know, did not disapprove of the course taken, I believe that I am justified in dealing with this case in the same way.

It is necessary to ascertain what was the legal position of the landlord and tenant respectively at the time the Local Government Act was passed: and next, to determine what change is effected by the new legislation. In this view we turn to the Irish Poor Relief Act of 1838. Section 61 directs rates to be levied on every occupier of rateable hereditaments; section 63 declares what hereditaments are rateable, and among them it mentions lands and also buildings. Section 64 enacts that the rate is to be a poundage rate, and that it is to be made on an estimate of the net annual value of the hereditament, on the supposition that it is in the hands of a tenant. By section 11 of the Valuation Act, 1852, the method of ascertaining the value of the buildings is the same; but the method of ascertaining the value of the land is altered, and directed to be made upon an estimate of the net annual value with reference to the price of several articles of agricultural produce specified. Returning to the Act of 1838, section 71 directs the rate to be paid by the actual occupier at the time the rate is made. Section 74 enacts that where the occupier shall be liable to pay a rent in respect of the property he occupies he may deduct from such rent, for each pound of the rent, one-half of the sum which he shall have paid as rate in respect of each pound of the net annual value. To this right of deduction by the tenant a limitation was subsequently imposed, providing that in no case shall the occupier's deduction be more than half the actual amount of rate paid (12 & 13 Vict. c. 104, sect. 11).

(1) [1900] 1 I. R. 68.

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These are the sections in the earlier rating statutes that bear on the question, and from these we arrive at the conclusion that a building is a hereditament by itself—that it must be valued separately from the land, that the method of ascertaining the value of the land is different from the method of ascertaining the value of the buildings. We now turn to the Land Acts.

In the Act of 1881, sect. 8, sub-sect. 1, empowers the Land Commission Court to fix the fair rent on *a holding*.

Sub-sect. 9 enacts that no rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant.

I now turn to section 1 of the Land Law (Ireland) Act of 1896. Sub-sect. 1 directs the Court to add a schedule to their order showing the gross rent, on the assumption that all the improvements were made by the landlord. It must also show the improvements made by the tenant, and the deduction made from the rent on account of them. This record is directed to be admissible in evidence, and is intended to show the way in which the fair rent was arrived at. We are now in a position to ascertain the respective rights of landlord and tenant in the matter of deduction of poor rates at the time of the passing of the Local Government Act of 1898. I pointed out to Mr. Campbell, if his contention as to the effect of sect. 8, sub-sect. 9, were well founded, that from the time a fair rent order under the Act of 1881 was made, the tenant had no right of deduction in respect of improvements. He assented to this, and explained that until the Act of 1896 was passed, making the Pink Schedule evidence, it was impossible to show what improvements were exempted from rent. Mr. Campbell's contention is that in a composite holding, the tenant's building is a separate rateable hereditament—that as no rent is allowed in respect of it, no deduction from the poor-rate can be made in respect of it—that the privilege of deduction is co-extensive with the liability to pay rent, and that when the liability to pay rent ceases, the right of deduction goes with it. He has further satisfied me that if the tenant's contention is right, having regard to sect. 1, sub-sect. 3 of the Act of 1896, it was possible for a tenant, between the years 1896 and 1898, by building houses unsuitable to the holding, to add to the landlord's liability

for rates in respect of such buildings, though the landlord can get no additional rent. I do not think such a case has often occurred.

The Rating Act of 1838 contemplates a tenant in possession of property, composed of one kind of rateable hereditament, such as land, or of two kinds, such as land and buildings. It contemplates the payment of a single rent for such holding, and it enacts that for each pound of the rent which the tenant is liable to pay, he may deduct half the sum which he shall have paid as rate in respect of each pound of the valuation. Whether the buildings are made by the landlord or the tenant is, in my opinion, wholly immaterial, the proportionate reduction must be allowed on every pound of *rent*. Does the Land Act of 1881 make any change? I think not. In section 8, sub-sect. 9 is to be read with sub-sect. 1. The Court is required to fix a fair rent upon a holding, and in the proceedings under this Act, when arriving at the amount of the rent of the holding they are to allow nothing in respect of tenants' improvements. The holding then becomes subject to the rent so fixed. The rent issues out of all and every part of it, even though some parts of it may be wholly unproductive. The entire holding is a security for the rent, and in default of payment the entire holding can be the subject of ejectment, pursuant to the statute. I must assume in the present case that the fair rent was fixed on the basis that the incidence of rates was to be the same as heretofore.

We now come to the Local Government Act. It is plain that it is the intention of the Act that the agricultural grant is to go in aid of agricultural land; that, roughly speaking, the tenant is to get the benefit to the extent of half the county cess, and the landlord to the extent of half the poor-rate in the standard year. Sect. 52 enacts that the occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor rate; but this is subject to the exception in this Act, and to the provisions hereinafter contained respecting occupiers under existing tenancies.

This brings me at once to sect. 54, which only deals with the case of existing tenancies. My decision is only conversant with the tenancies dealt with in this section, *i. e.* with existing tenancies

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or tenancies in which a statutory term is subsisting. When in future a fair rent is fixed, it must be on the assumption that the occupier shall not be entitled to deduct any part of the poor-rate from his rent. The section is required in consequence of the application of the agricultural grant, and the consequent change in the incidence of the rates. It endeavours to effect a temporary adjustment. To what extent does the Act interfere with the existing state of circumstances? Only to the extent that in so far as the holding is agricultural, to that extent alone is the landlord to receive the benefit of the agricultural grant. This accounts for the 5th subsection in sect. 54, so much relied upon for the landlord, providing that in case of a composite holding the foregoing provisions are to apply separately, as if each part were a separate holding. The amount of benefit the landlord is to receive is limited to the agricultural element in the holding. I can find nothing in the Act on which to found the contention that the Act interferes with the present incidence of the rate further than to the extent I have stated. I am therefore of opinion that the tenant's contention is right, and I think he is entitled to the costs of the argument.

W. C. S.

Appeal. 1900. Feb. 26, 27. March 1.

The Receiver appealed to the Court of Appeal (Lord Ashbourne, C., Fitzgibbon, Walker, and Holmes, L.JJ.).

Ronan, Q.C., and *Campbell, Q.C.* (with them *J. Little*), for the appellant.

Matheson, Q.C., and *Harrison, Q.C.* (with them *Powell*), for the respondent.

March 1.

LORD ASHBOURNE, C.:—

This is an appeal from Mr. Justice Ross, and derives its importance from the fact that the point involved affects a large number of landlords and tenants, and that this, we have been told, is a test case to settle the question raised on sect. 54 of the recent Local Government Act relating to existing tenancies.

The tenant had a fair rent fixed on the 15th February, 1899, the old rent being £29 1*s.* 6*d.*, which was reduced to £27 15*s.* The valuation of the entire holding is £29, of which £26 10*s.* is on the lands and £2 10*s.* on the buildings. The buildings were erected by the tenant, and no rent has been placed on them. The Pink Schedule attached to the order shows how this was done. As it is contended that the new Local Government Act makes the important change alleged it is necessary to see what was the position of landlord and tenant in reference to rates before 1898.

Under the Irish Poor Relief Act (1 & 2 Vict. c. 56) rates were to be levied on every occupier of rateable hereditaments, including lands and also buildings; and the rate was to be a poundage rate, made on an estimate of the net annual value, on the supposition that it was to be in the hands of the tenant. The 74th section, so much discussed in the argument, enacts that when the occupier shall be liable to pay a rent in respect of the property he occupies, he may deduct from such rent for each pound of the rent one-half of the sum which he shall have paid as rate in respect of each pound of the net annual value.

Under the Poor Law Valuation Acts buildings were valued separately from the land, and different methods were employed to value each kind of property.

It is necessary now to notice how far the Irish Land Acts affect the question. The Act of 1881 enabled the Land Commission to fix the fair rent of a holding, but provided that no rent should be allowed or made payable in any proceedings in respect of any improvements made by the tenant. The Act of 1896 directed the Land Commission to add what is known as the Pink Schedule to their order, showing the gross rent, on the assumption that all the improvements were made by the landlord, and also (amongst other things) the improvements made by the tenant and the deduction made from the rent on account of them. The Pink Schedule in this case shows this gross rent, and also the deduction which the tenant was entitled to in consequence of having made the improvements.

The Poor Law Act contemplated the payment of a single rent by an occupier for a holding—it might be composed of land or buildings, or of both;—and it provided that for each pound of the

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rent, to which the tenant was liable, he might deduct half the sum which he had paid as rate in respect of each pound of the valuation.

The Land Act of 1881 made no change in the right of the tenant to make this deduction. There is no provision in it which countenances the idea that such a suggestion was ever present to the mind of the Legislature. Power was given to fix the fair rent of a holding, and in doing so to avoid making rent payable in respect of improvements made by the tenant. When the fair rent is fixed it issues out of every part of the holding. The entire holding becomes a security for the rent, and subject to ejectment in default of its payment. Although this topic was suggested during the argument I failed to hear either Mr. Campbell or Mr. Ronan give any assent to the contrary suggestion. It is manifest that to exclude the buildings on a holding when made by tenants from the security for the rent would strike a grave blow at the landlord's protection, and I am satisfied that if any such idea had been suggested as being involved in the Act of 1881 it would long ago have attracted prompt attention.

Has the Local Government Act made any change? Does the construction of the Act give any indication that a change was thought of? The change suggested is obviously one of importance, so far as existing tenancies are concerned, and one that the Legislature would more naturally have dealt with in express terms than leave to obscure inference. The agricultural grant was to go in aid of agricultural land; and sect. 52 enacts that the occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor-rate, subject to provisions respecting existing tenancies. Existing tenancies are dealt with in sect. 54, which was needed in consequence of the agricultural grant to prescribe for such tenancies the consequent changes in the incidence of rates. But that section was only needed for that purpose, and must not be distorted to meet far-fetched suggestions. The landlord was to get the benefit of the agricultural grant, so far as the holding was agricultural, and therefore the fifth sub-section of the last-mentioned clause enacted that its provisions should apply to a composite holding, as if each part was a separate holding. For the purposes of the agricultural grant, but for no other purpose, each part had to be

so regarded. What is, then, the argument? That as no rent is allowed on buildings made by the tenant, no deduction from the rent for poor-rate can be made in respect of them. This would be an entirely new departure, contrary to all previous legislation and practice, entirely at variance with the natural meaning of sect. 54. I can find nothing in the Local Government Act to interfere with the present incidence of the rate in the case of existing tenancies further than the extent that was rendered necessary by the agricultural grant. I think that the order of Mr. Justice Ross was right, and that this appeal should be dismissed with costs.

FITZ GIBBON, L.J.:—

The grievance of which Mr. Campbell complains is that the judgment of Ross, J., entitles the tenant to deduct poor-rate assessed on buildings for which the landlord under the Land Law Acts gets no rent. But this grievance did not arise under the land legislation; it is as old as the Poor Relief Act, 1838; because a tenant could always increase the valuation of his holding by erecting buildings, and could thus increase the amount of poor-rate which sect. 74 of that Act entitled him to deduct from his rent. He could do so even when he held in fee-farm, and the landlord could not recoup himself, unless he could raise the rent, in any case in which the whole county cess and poor-rate was not paid by the tenant.

I cannot see that the Land Law Acts or the Local Government Act, 1898, have made any change in the subject-matter out of which rent issues. It still issues out of the buildings, no matter by whom erected, as well as out of every other part of the holding. The Act of 1881, section 8 (9), does not say that the fair rent is not to issue out of the tenant's improvements. It only prescribes that, in ascertaining the amount of the fair rent, no rent shall be allowed or made payable in respect of those improvements. It makes no alteration in the rights of deducting rates which were fixed by the contract of tenancy, but among the circumstances of the holding the Land Commission should, no doubt, consider, in ascertaining the fair rent, any loss of income caused to the landlord by any increase of the deduction for rates due to the erection by the tenants of buildings which increased the valuation, but did not

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increase the rent. When the fair rent is fixed, the tenant's improvements, as well as every other portion of the holding, form an integral part of the security for it. So far as concerns the question now before us, the only change which was made by the Act of 1896 was to make it the duty of the Land Commission, unless both parties should otherwise request, to ascertain and record certain particulars when fixing a fair rent, showing how buildings and other tenants' improvements had been dealt with in fixing the rent, and what deduction had been made on account of them. This is the object and effect of "the Pink Schedule," and section 1 and the provisions relating to this Schedule are the only provisions in the Act of 1896 dealing with the matter.

The Local Government Act of 1898 does not make the rent issue out of the buildings upon a holding one whit less than it did before. The Legislature having, out of its bounty, provided the agricultural grant in ease of the poor-rate on agricultural land, by section 54 secures a share of this benefit to the occupiers under existing tenancies. This share is regulated by their existing rights of deduction for rates. Sub-section (1) deals with four cases, (*a*), (*b*), (*c*), and (*d*); (*a*) is the case where the occupier is entitled to deduct half the county cess; (*b*) is the case of non-agricultural land where he is entitled to deduct half the poor-rate; (*c*) is the case where he is entitled to deduct the whole of *both* county cess and poor-rate, and it limits the reduction of the rent to one-half the poor-rate where the holding is agricultural land, taking off the whole where the land is non-agricultural, and taking off the whole of the county cess whether the holding is or is not agricultural; (*d*) increases the rent by half the poor-rate where the occupier is not entitled to make any deduction, and thus in every case the benefit of the agricultural grant is secured to the person, landlord or tenant, who would otherwise have had to bear the amount which is relieved by the grant. The transfer of the liability to the occupier, both in the case of cess and poor-rate, is countervailed, where the terms of the tenancy so require, by a corresponding alteration in the amount of the rent, but this is, in turn, modified in the case of poor-rate on agricultural land, so as to leave the benefit of the agricultural grant, amounting to half the standard rate, to the landlord or to the tenant, as the case may require, and

variations from the standard affect the occupier only, presumably because he is supposed to choose, and to be responsible for, the future administrators of the rates. The holding remains one and entire—the rent continuing to issue out of every part of it—as before, but a fixed *reduction* of rent, equal in amount to the former *deduction* for rates at the standard poundage, is made, except where the occupier has been relieved by the agricultural grant from paying half the standard poor-rate. This takes place only on the *valuation* of agricultural land, and sub-section (5) provides for the separate treatment of this valuation in ascertaining the amount of the reduction, where the holding consists partly of agricultural land, and partly of non-agricultural property, whether land or buildings. The result is to leave the tenant entitled to a *reduction of rent* equal to the *deduction for poor-rate*, which he was previously entitled to make in respect of the assessment on buildings included in his holding, irrespectively of the question whether those buildings were or were not "tenants' improvements." In this sense, and for the purpose of this calculation, there is "a division of rent," but this does not affect the right of reduction to which Ross, J., has, in this case, declared the tenant to be entitled.

WALKER, L.J.:—

The immediate question which we have to determine, arises under sect. 54 (1) (*b*) of the Local Government (Ireland) Act, 1898, which provides that, "when the occupier is entitled to deduct from his rent one-half of the poor-rate, and the holding is not agricultural land, the rent shall be reduced by half the appropriate standard amount."

When a holding comprises both land and buildings, these buildings are to be treated as a separate part of it and, therefore as non-agricultural land. This is solely for the purpose of the new agricultural grant.

The Local Government Act creates an Agricultural Grant which is a sum to be annually paid to the Local Taxation (Ireland) Account, equal to half the amount certified under the Act, to be taken as having been raised in the whole of Ireland by poor-rate and county cess off agricultural lands, during the twelve months, ending, as regards poor-rate, on the 29th September, 1897, and as

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regards county cess on the last day of June, 1897, which twelve months are called the standard financial year. The standard amount means a sum equal to what is produced by a rate on the rateable value of the holding in that standard financial year according to that standard rate of poor-rate or county cess.

Agricultural land means every hereditament entered as "land" in the valuation list in the Valuation Acts.

The grant in case of landlords, as regards agricultural land is worked out under the Act, both as to existing tenancies and future ones. There is apparently no difficulty as to the latter; the question in the present case arises on section 54, "when the poor-rate is made upon an occupier of any holding under an existing tenancy."

Reading section 54 (1) (*b*) in its ordinary sense, it seems to me that, incorporating the definitions, its plain meaning is, where an occupier is entitled to deduct from his rent, *i. e.* his entire rent payable for his holding—one-half of the poor-rate assessed on the land and also on the buildings comprised in that holding, and a separate part of the holding consists of buildings, that the entire rent payable shall be reduced by half the appropriate standard amount. It refers to the standard year 1897, and the standard rate in that year, and the word "appropriate" introduces the working of an easy sum by apportionment, as we have the subject-matter, from which a reduction is to be made, and also the rates on agricultural land and on buildings, the amounts of which respectivelyappear in the rating.

The argument here is that it would be illegal and unjust to reduce the rent by any reference to the buildings, because in the case with which we are dealing being one in which a fair rent was fixed under the Acts 1881–1896, no rent was put upon the buildings which were made by the tenant, and therefore the reduction would be made from a non-existing subject. If there is anything in the point it had existence from August, 1881. It seems to me the argument is all founded on a fallacy and a misconception of the principles by which exemption from rent in respect of buildings or other improvements made by the tenant are regulated. At all times, since the Act of 1838, and before the Act of 1881, rates were paid by the occupier of rateable lands and buildings,

comprised in his holding. The liability as between him and his landlord might be varied by contract or the relation of rent to the valuation. If there were no buildings, the rates were assessed on the soil, and when the tenant erected buildings and a valuation of them was made, the same rent was paid and the same rights of deduction out of it in respect of the rate on the building as a conjoint subject with the land continued. The fixing of a fair rent under the Act of 1881 is not an imposition of rent for the first time. It is an adjustment of the contract rent, and it is diminished or increased or left unaltered according as the circumstances of the case and the interests of landlord and tenant require. As adjusted or fixed, it still issues out of all the subjects included in the holding. The additional value derived from the tenant's expenditure is not included as an item in the sum which made up the total of the adjusted rent, but the single figure of rent for the holding issuing out of every part of the holding which still includes the building remains. During a statutory term the whole holding may be recovered in ejectment for non-payment of rent. The tenant cannot sublet the building. Furthermore, the landlord is left by the decisions under the Land Acts some interest even in the improvements themselves, and it is often the case that the exemption from rent in respect of an improvement is only in respect of part of a building.

I think the argument is little more than a play upon words, and if pushed to its logical extremity would deprive the landlord of a large part of the security for his rent.

I cannot see how it can be contended that either (*b*) or (*c*) of sub-section 1 of section 54 have no operation till the rent be apportioned. The thing to be reduced is the thing from which the title to make the deduction exists or the rent. Mr. Ronan contends that those sub-sections are unworkable and fail of operation. This is the last result which a Court of construction arrives at, but I think the sections are plain enough, once it is understood that the effect of exempting from rent under the Land Acts is not to exclude that portion of the demise from the holding by reason of a building or part of a building, or some other improvement, having been erected on it. The result of the decision of Judge Ross and ours, will be to leave the landlord in

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the same position in which he was, so far as regards that portion of the holding which has buildings upon it, and give the tenant the same right of reduction which he had before in respect of the apportioned part, and that appears to me to be exactly the object of the Legislature.

HOLMES, L.J. :—

The questions that come before this Court on the construction of long and complicated statutes recently enacted, such as the Local Government Act, are generally perplexing. I am glad, however, to say that this is an exception. From the opening of the case, I have seen no difficulty in it.

The foundation of the argument on behalf of the landlord is fanciful. It is that after a fair rent has been fixed for a holding, and after it has been found that the buildings thereon are tenants' improvements, no rent is payable in respect thereof. I never heard this proposition before, and if acted on it would lead to a much greater invasion of the landlord's rights than was intended by the Legislature, for it would follow from it that the buildings had ceased to be part of the holding for all purposes. Section 8, subsect. 9 of the Land Law (Ireland) Act, 1881, when it provides that "no rent shall be allowed, or made payable *in any proceeding under this Act* in respect of improvements made by the tenant," relates only to the fixing of the fair rent; but does not alter the old principle of law that the rent issues out of every part of the demised premises. The fair rent, however it is arrived at, is the rent of the holding and payable in respect of whatever is comprised thereon.

When this is borne in mind, and it is also remembered that under the Valuation Acts there is always a separate valuation of the lands and buildings, the provisions of the 52nd and 54th sections of the Local Government Act are easily understood. The 52nd section deprives the occupier of the right conferred on him by the Poor Law Act to deduct from his rent a portion of the poor-rate paid by him. The 54th section provides for a reduction of the rent, in certain cases, one of them being "where the occupier is entitled to deduct from his rent one-half of the poor-rate and the holding is not agricultural land, in

which case the rent shall be reduced by half the appropriate standard amount." A question might have occurred on this provision whether land with buildings on it came within it; and to clear up any ambiguity there follows the 5th sub-section declaring that, "where part of the holding is agricultural land and part is not agricultural land, the foregoing provisions shall apply separately to each such part, as if it were a separate holding." The obvious—indeed the only possible meaning in a case like the present, is that the aggregate rent is to be reduced by half the appropriate standard amount calculated on the valuation of so much of the holding as consists of buildings.

I followed Mr. Campbell's illustrations and calculations, but I do not think that any of them involves absurdity, although there may be some inequality which it is easier to point out than to remedy.

Solicitor for the receiver: *N. Goddard.*
Solicitor for the tenant: *W. J. Robinson.*

G. Y. D.

IN THE MATTER OF THE ESTATE OF AMBROSE C. W. COX, OWNER; THOMAS FARRELL, PETITIONER.

Practice—Payment out of Court—Puisne incumbrancer—Wasting security—Life estate with policy of insurance.

A sum of money, representing surplus rents of the lands for sale (a life estate with policies of insurance as a collateral security) was in Court. A puisne incumbrancer, assignee of an English judgment, extended to Ireland under the Judgments' Extension Act, 1868, and registered as a mortgage, applied to have it paid out to him in part payment of his debt, on the ground of the security being a wasting one. The prior incumbrancers, to whom interest was paid to date, and who made no claim for the money, objected, impugning the validity of the statutable mortgage founded on the English judgment; also on the ground that their mortgages were on a wasting security, the policies being possibly voidable: and also on the ground that owing to the application

Ross, J. 1900.

of the 40th section of the Land Act, 1896, this money might be required for the redemption of superior interests.

In re Cox's Estate.

Held (without deciding the question of the validity of the statutable mortgage), that the application should be refused.

If sufficient money were in Court it would be properly applicable to the satisfaction of the prior incumbrancers.

Application on behalf of William Arthur Haslam and James Dodd Swallow, incumbrancers and owners of a judgment mortgage, dated the 17th September, 1887, affecting the life-estate of the owner of the lands ordered to be sold in this matter, for an order that the accountant-general be directed to pay to the applicants the sum of £500 (representing surplus rents and profits of the lands for sale herein; after paying interest on all incumbrances), in part payment of the principal sum of £2247 6*s.* 6*d.* due to the applicants on foot of the judgment mortgage.

The following facts appeared from the affidavit of James Dodd Swallow. By an order of the High Court of Justice in England, Queen's Bench Division, dated the 5th October, 1885, Charles Hopkinson & Sons recovered judgment against the owner for the sum of £4569 12*s.* 4*d.*, and £11 9*s.* 6*d.* costs. This judgment was extended to Ireland under the Judgments' Extension Act, on the 25th August, 1887, and entered for £4584 6*s.* 10*d.*, including £3 5*s.*, the costs of extending it. The judgment, so extended, was on the 17th September, 1887, registered as a mortgage against the owner's interest in the lands for sale in this matter, which was that of a tenant for life. There was one charge affecting the fee and several affecting the life-estate (secured by policies of insurance kept up by the receiver), all of which were in priority to the judgment mortgage. The judgment mortgagees' interest was subsequently sold, and purchased by the applicants, and duly assigned to them. At the time of such assignment there was due on foot of the judgment mortgage the sum of £2247 6*s.* 6*d.*, and interest from the 31st March, 1898. Interest on foot of all the incumbrances, including the judgment mortgage, had been paid to date; and there was standing to the credit of the matter the sum of £500. The owner was living in America, and, so far as the applicants were aware, had no other property.

Brunskill, for the applicants:—

This is a wasting security, and we are entitled to the order sought for:—

Pim, for the petitioner having carriage:—

All the incumbrancers object to this payment. 1, The judgment mortgage is invalid, being founded on an English judgment which can only be extended to Ireland for the purpose of execution (sect. 4 of the Judgments' Extension Act, 1868, 31 & 32 Vict. c. 54), and registering a judgment as a mortgage is not execution: *Ex parte Johnston*: *Johnston* v. *Watson* (1); *In re Lambe's Estate* (2); *Barnett* v. *Bradley* (3). 2, Even had the owner applied for this money, if the incumbrancers objected, it could not be paid out to him.

H. G. Richards, for Mr. Goodbody, a prior incumbrancer on the life-estate:—

We object to this payment. Our security is also a wasting security. The policies might be voidable if the conditions were broken. The application for a request under the 40th section of the Land Act, 1896, is pending, and it is not known what will be required to redeem the superior interests, and the fixing of second term judicial rents is also pending; so, although we are paid at present, *non constat* that we will be paid interest in full in the future: *In re Kearney's Estate* (4); *Hutchins* v. *Hutchins* (5); *In re Henkell's Estate* (6).

Jefferson, for E. M. Kelly, another prior incumbrancer on the life-estate:—

We also object—the judgment mortgage is invalid: this is not execution under the Act: *Johnstone* v. *Bucknall* (7); *Kenney* v. *Kenney* (8).

(1) [1893] 1 Q. B. 21.
(2) I. R. 1 Eq. 556; I. R. 3 Eq. 286.
(3) 26 L. R. Ir. 209, 212.
(4) 25 L. R. Ir. 89.
(5) 4 Ir. Ch. R. 224.
(6) 23 L. R. Ir. 540.
(7) [1898] 2 I. R. 499.
(8) I. R. 4 Eq. 181.

Ross, J. 1900.

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Brunskill, in reply :—

The judgment mortgage is a valid incumbrance. The provisions of section 1 of the Judgments' Extension Act are very full; and the words, "in so far only as it relates to execution under this Act" in section 4 are included for the purpose of retaining the jurisdiction of the original Court over the judgment, in the case of an application being made to have it set aside. The prior incumbrancers, who are well secured, have no interest in raising this point about the validity of the judgment mortgage; it is a matter only affecting the judgment mortgagee and the owner. The judgment mortgagee is in the same position as the owner would be in applying to have this money paid out.

Ross, J. :—

In the view I take, it is not necessary for me to decide the question of the validity of the registration, as a mortgage, of an English judgment, extended to this country under the Judgments' Extension Act of 1868. For other reasons, I am of opinion that I ought not to allow this money to be paid out to Mr. Brunskill's clients. In the first place it was pointed out to me that the security of the prior mortgagees is a wasting security, or rather a security in peril. The policies of insurance would be worthless if the owner went abroad to any place not authorized by their conditions. I am further of opinion that in case sufficient money were in Court, it would be properly applicable to the satisfaction of the prior charges.

In the next place, I have not got any evidence of what will be required for redemption of superior interests, if the 40th section is applied. I have no information as to how much is likely to be realised by the sale under the section. It is possible that the mortgages on the life-estate might be left partly unpaid. I refuse the motion, giving all parties, except the applicants, their costs with their demands.

Solicitors for the applicants: *Read & Mac Nab.*
Solicitors having carriage: *Goodbody & Tisdall.*
Solicitor for E. M. Kelly: *Harford Kelly.*

W. C. S.

DAVOREN *v.* WOOTTON (1).

Appeal.
1900.
Feb. 14.

Executor—Liabilities—Action for damages for fraudulent misrepresentation—Judgment against defendant directing an inquiry for the purpose of ascertaining amount of damages—Appeal by defendant—Death of appellant pending appeal—"Actio personalis moritur cum persona."

The plaintiff brought an action against several defendants alleging that by their fraudulent misrepresentations he had been induced to take shares in a Company promoted by them which proved to be valueless, and claiming damages. The Master of the Rolls held that the plaintiff had been induced by the fraudulent misrepresentations of certain of the defendants to take the shares in question, and held the said defendants answerable for the plaintiff's loss: his judgment ordered the said defendants to pay to the plaintiff the amount paid by him in respect of the shares with interest less by the value of the shares, and he directed an inquiry to ascertain the value of the shares. The said defendants appealed from this judgment, two of them joining in their appeal, the others appealing separately. After the appeals were opened, and before the arguments were concluded, one of the two appellants who joined in their appeal, died:—

Held, that the rule *actio personalis moritur cum persona* applied, and that the proceedings could not be continued against the personal representatives of the deceased appellant.

MOTION to the Court of Appeal to continue proceedings on the death, pending argument, of an appellant.

In an action brought to recover damages for fraudulent misrepresentation by the judgment of the Rt. Hon. the Master of the Rolls, dated the 25th July, 1899, it was declared that the plaintiff was induced by the fraudulent misrepresentations and fraudulent omissions in the prospectus of the Components Tube Company, Limited, issued by the defendants Robert Wootton, and four others therein named, and each of them, to subscribe and take thirty shares in the said Company: that the plaintiff was induced by the unlawful conspiracy of the said defendants, and by the acts done, and misrepresentations made in pursuance thereof to subscribe for

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1900.

DAVOREN v. WOOTTON.

and take the said shares: that the said prospectus was fraudulent within section 38 of the Companies Act, 1867, as against the plaintiff on the part of the said defendants and each of them: that the said defendants were answerable to the plaintiff for all loss sustained, and money paid by him in respect of the said shares: that the said defendants should pay to the plaintiff the sum of £30 and interest thereon as mentioned until the date of payment, less by the value of the shares when ascertained by the inquiry thereinafter directed, together with the costs of the action when taxed and ascertained: that the following inquiry should be made, that is to say, an inquiry as to what was the market value of the said shares at the date of the said order (1): that upon the said defendants on or before the 10th day of August then next, lodging in Court to the credit of the action the sum of £1600 to abide the order of the Court in respect of costs or otherwise in this action, execution upon foot of this judgment be stayed until the 1st day of November then next.

It appeared that there were several similar actions pending in the Chancery Division by other shareholders in the same Company against the defendants, and that the present action was a "test" action.

Robert Wootton, and one of his co-defendants, Frederick Cuthbert, joined in appealing by a single notice of appeal from the order of the Master of the Rolls. Three other defendants also appealed, serving separate notices of appeal. Two of the latter were represented by distinct counsel, and one appeared in person. All the appeals were heard together: and after counsel for Wootton and Cuthbert had opened their appeal, but before they had replied to the respondent's arguments, Wootton died. His counsel at once called the attention of the Court to the matter, and in the reply confined their argument to the case of their surviving client. At the conclusion of the argument the Court reserved judgment. Before judgment was given on the appeals, counsel for the re-

(1) The order of the Master of the Rolls was subsequently (1st March, 1900), affirmed by the Court of Appeal, with the variation, however, that the value of the shares was to be ascertained as of the date when the writ was issued.—REP.

spondent obtained liberty from the Court of Appeal to serve such notice as they might think fit to bring the persons representing the deceased appellant before the Court. The respondent accordingly served the following notice of motion :—

"Whereas, Robert Wootton, one of the above-named defendants, against whom a decree in this cause was made by the Master of the Rolls, on the 25th day of July, 1899, appealed with the said defendant Cuthbert from the said decree (from which the other co-defendants also appealed) to Her Majesty's Court of Appeal in Ireland: and whereas the said Robert Wootton died during the arguments of said appeal, and before judgment therein, and the said cause is now standing for judgment in the said Court of Appeal, but no legal representation has yet been raised to the estate of the said Robert Wootton. Now, you and each of you are hereby required to take notice that in default of a legal personal representative being raised to the estate of the said Robert Wootton, deceased, before the date hereinafter mentioned, or the executor or executors named in any will which he may have made taking the necessary steps before said date to enable said appeal to be duly prosecuted on behalf of the representatives of the said Robert Wootton, deceased, counsel on behalf of the plaintiff, the respondent in said appeal, will, on the 12th day of Februray, 1900, at the sitting of the Court, apply to the Court of Appeal for liberty to proceed to judgment in the said cause, and that the said appeal so taken by the said Robert Wootton, deceased, be dismissed with costs, and if necessary that a personal representative may be appointed to represent the estate of the said Robert Wootton, deceased, in said cause for the purpose of having said appeal dismissed with costs in default of the due prosecution thereof, and for such other order as to the Court may seem fit: And you and each of you are further required to take notice that on Monday, the 29th day of January, 1900, this matter was mentioned to the said Court of Appeal, and the said Court was informed that the present notice would be given to such persons as might be thought advisable, and in compliance therewith this notice is being served on you and each of you.

"Dated this 1st day of February, 1900.

"Signed, HORAN & SHORTT,
Solicitors for the plaintiff.

"*To* MRS. HELEN WOOTTON, RICHARD CHINN,
EDWIN LAW, MESSRS. D. & T. FITZ GERALD."

When the motion came on for hearing the executrix who had proved the deceased appellant's will, attended by counsel and opposed the motion.

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There was a preliminary discussion as to whether the application to continue the proceedings in the name of the executors should not be made in the first instance to the Master of the Rolls, but it was arranged that the Court of Appeal should hear the motion.

The Rt. Hon. The Macdermot, Q.C., and *O'Shaughnessy, Q.C.* (with them *Carrigan*), for the respondent:—

The law is well settled that when the estate of a deceased wrong-doer has been increased by the wrong done, the rule *actio personalis moritur cum persona* does not apply: *Peek* v. *Gurney* (1); *Twycross* v. *Grant* (2). In cases of fraud the remedy at law does not die with the person, but the same relief shall be had against an executor out of the assets of his testator as ought to have been given against the testator himself: *Garth* v. *Cotton* (3). Where, by a wrong done, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor: *Hambly* v. *Trott* (4). The plaintiff's judgment has passed *in rem judicatam*: he has a right to recover £30: the defendants have a right to set off so much as the inquiry may ascertain to be the value of the shares. In *In re Duncan*; *Terry* v. *Sweeting* (5), there was no judgment. Where a party died pending the hearing of a bill of exceptions, it was held that the action did not abate: *Alford* v. *Beggs* (6); Bewley and Naish, pp. 181–187.

Ronan, Q.C., and *Henry, Q.C.*, for the executors of Wootton:—

The order appealed from is not a final judgment: it finds the deceased guilty of a *tort*, but directs an inquiry as to damages: *Phillips* v. *Homfray* (7) is an express authority that the action does not survive against the executors. The order here is analogous to the old form of decree *quod computet* which did not pass into *rem judicatam* till the final decree: *Smith* v. *Eyles* (8). Before there is a *res judicata* in this case there must be a report and a final

(1) L. R. 6 H. L. at p. 393, *per* Lord Chelmsford.
(2) 4 C. P. D. 40.
(3) 1 Dick. 183.
(4) 1 Cowp. 371, 376.
(5) [1899] 1 Ch. 387.
(6) 12 Ir. L. R. 528.
(7) 24 Ch. D. 439.
(8) 2 Atk. 384.

decree upon it: *Perry* v. *Phelips* (1); *Chadwick* v. *Holt* (2). Until the inquiry is held and the costs taxed, it is not a complete and final decree: *Sadlier* v. *Robins* (3). [Fitz Gibbon, L.J., referred to Order XLII., Rule 25.] The rule by which actions of *tort* became abated by the death of the parties has been amended by the 7 Wm. 3, c. 7, s. 2; 8 & 9 Wm. 3, c. 11, s. 6; 9 Wm. 3, c. 10, s. 6, the Common Law Procedure Act, 1853, sects. 159, 160; the Common Law Procedure Act, 1856, s. 93, and the Irish Chancery Act of 1867, s. 157. None of these enactments enable this action to be revived against the executors of Wootton: *Earl of Leitrim* v. *Maddison* (4); *Flinn* v. *Perkins* (5); *Kirk* v. *Todd* (6); *Stanhope* v. *Stanhope* (7); *Bowker* v. *Evans* (8); *Twycross* v. *Grant* (9).

LORD ASHBOURNE, C.:—

This case comes before us on an application on behalf of the plaintiff, who is the respondent in the appeal, asking that the proceedings may be revived and continued in the name of the executrix of Wootton, the deceased appellant. There was some argument at the outset as to the precise form in which the discussion before us should take place—as to whether the application to revive the proceedings should not be made in the Court below, and only come before us, if at all, on appeal from an order made by the Master of the Rolls. But it was suggested that it would be more convenient, as the point had been raised in this Court, that both parties should at once obtain our opinion as to their position, and this view has been acceded to by the counsel who have argued the case.

The Master of the Rolls gave judgment against several defendants in an action in which they were charged with false representation and conspiracy to defraud: all the defendants against whom judgment was given appealed, two of them—Cuthbert and Wootton—having joined in one notice of appeal, and

(1) 10 Ves. 33.
(2) 8 De G. M. & G. 584.
(3) 1 Camp. 253.
(4) I. R. 3 C. L. 601.
(5) 32 L. J. Q. B. 10.
(6) 21 Ch. D. 484.
(7) 11 P. D. 103.
(8) 15 Q. B. D. 565.
(9) 4 C. P. D. 40.

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being represented by a single set of counsel, while the others served separate notices of appeal and were separately represented. All the appeals were heard together: counsel for Wootton and Cuthbert had opened their appeal, but had not replied when Wootton was killed in a railway accident. Mr. Ronan at once called attention to the position, and in replying to the respondent's argument he limited his reply to the case affecting his surviving client, Cuthbert.

Since the argument, Wootton's widow has proved his will, and the question now arises as to what is her position, as his representative, in respect of any liabilities existing under the judgment of the Master of the Rolls. That judgment was pronounced in the action I have described, brought in reference to the taking of shares in a Company under circumstances under which the Master of the Rolls held the defendant Wootton, amongst others, liable to the plaintiff in damages, and by his decree directed that he and the other appellants should pay to the plaintiff the sum of £30 with interest thereon until payment, less by the value of the shares in respect of which the action was brought when ascertained by an inquiry also directed by the decree. The Master of the Rolls also declared the plaintiff entitled to his costs when taxed and ascertained, but directed that upon the defendants lodging in Court within a named period the sum of £1600 to abide the order of the Court in respect of costs or otherwise in this action, execution on foot of this judgment should be stayed.

That is the judgment from which the several appeals were brought. In form it is plainly not a final judgment in the action. It is an order leading up to a final judgment, and for that purpose directing a reference to chambers for the purpose of ascertaining damages, and a taxation by the Taxing Officer for the purpose of taxing and ascertaining costs, but requiring the reference to chambers, and the taxation to take place before the judgment could be completed.

The question is, how far does a judgment in this form affect the personal representative and the estate of the deceased appellant? The Macdermot has contended that the maxim *actio personalis moritur cum persona* does not apply in cases like the present, and that, therefore, the respondent was entitled to bring in the personal

representative of the deceased defendant. Mr. Ronan has argued that the whole action against his client is gone, that it was not an action which could survive, that it has absolutely abated, that having regard to its form and subject-matter it could not be revived, and that there was, as yet, no final judgment. In support of his contention he referred us to several statutes and authorities. I deem it necessary to refer to two only of the cases cited.

In *Phillips* v. *Homfray* (1), by the decree made in the action, it was declared that the defendants Homfray and Fothergill were liable to the plaintiff for minerals taken by them under the plaintiff's farm, and that Homfray and Fothergill were to compensate the plaintiffs for user of all roads and passages under the farm, and the following inquiries were directed:—1. As to the quantity of minerals taken, and their value? 2. What quantities of minerals had been carried by the defendants through the roads or passages under the farm? 3. What upon the result of the second inquiry ought to be paid by the defendants as way leave? 4. Whether the farm, and the mineral property of the plaintiff under it, had sustained any and what damage by reason of the way in which the defendants worked under the farm? Pending these inquiries, Fothergill died, and his executrix moved to stay proceedings under the 2nd, 3rd, and 4th inquiries; and it was held by Pearson, J., that the fourth inquiry must be stayed, but that as the estate of Fothergill had derived profit from the trespasses to which the 2nd and 3rd inquiries related, it was liable after his death, and that these inquiries must be prosecuted. The executrix appealed to the Court of Appeal, and it was there held by Cotton and Bowen, L.JJ. (*dissentiente* Baggallay, L.J.), that proceedings under the 2nd and 3rd inquiries must also be stayed, for that, apart from cases of breach of contract, a remedy for a wrongful act done by a deceased person cannot be pursued against his estate, unless property, or proceeds, or value of property belonging to another person have been appropriated by the deceased person and added to his estate. This case is, therefore, an express decision that, unless Wootton's estate can be shown to be

(1) 24 Ch. D. 439; 11 App. Cas. 466.

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increased by including in it the plaintiff's property or its value, this action cannot be revived against his executrix.

The next case to which I shall refer carries us a step further, and shows that the mere fact that the deceased's *tort* induced the plaintiff to subscribe for the shares does not prove that the deceased's estate is thereby increased so as to become liable to the plaintiff within the exception expressed in the decision in *Phillips* v. *Homfray* (1). In *Re Duncan*; *Terry* v. *Sweeting* (2), the purchaser from a testator of certain worthless shares in a limited Company claimed to be entitled to prove in an administration action for damages for misrepresentation against the testator's estate, and assessed his damages at £250, the price paid by him for the shares; and Romer, J., held that where, as in the present case, there was nothing among the assets of the deceased that at law or in equity belonged to the claimant, and the damages which had been done to him were unliquidated and unascertained, the executors of the wrong-doer could not be sued merely because his estate might have benefited by the wrong complained of; that the damages complained of were none the less unliquidated and uncertain from the fact that the claimant might be able to prove that the measure of his damages was the amount of the purchase-money paid for the shares, and that for these reasons the claim could not be allowed.

It is obvious that nothing can be more like the present case in some of its aspects, and I think the principles there stated must govern our decision. At the end of his judgment Romer, J., says, after referring to *Phillips* v. *Homfray* (1), and *Kirk* v. *Todd* (3), "If for any reason the purchaser is not entitled to insist on rescission of the contract, he cannot sue for the purchase-money, and can only sue for damages in an action for deceit: see *Clarke* v. *Dickson* (4). In the case before me, as already pointed out, the claim has not been treated as one for rescission." The learned Judge here calls attention to the recognised difference between the two forms of action. The action we have to deal with is like that before him, one for unliquidated damages which, though there

(1) 24 Ch. D. 439; 11 App. Cas. 466.

(2) [1899] 1 Ch. 387.

(3) 21 Ch. D. 484.

(4) E. B. & E. 148.

is a decree against the deceased defendant, have not yet been ascertained, and as against that defendant, the action being one of *tort*, died at the moment of his death.

I am, therefore, of opinion that we cannot make the order asked for by the plaintiff.

I purposely say nothing as to the effect of Wootton's death on the power of the Master of the Rolls to deal with the £1600 which has been lodged in Court, as that question is not now before us.

FITZ GIBBON, L. J. :—

I agree that we cannot make the order asked for upon this motion. A decree for damages for deceit was made by the Master of the Rolls against five defendants in this action. Four appeals have been brought to this Court. In one of these, two of the defendants, Cuthbert and Wootton, joined, and Wootton died pending the hearing of this joint appeal.

The decree was, in form and substance, the final decree in the action. But it was not complete, either in form or in substance, nor could execution issue upon it, because the amount of the damages was not liquidated nor ascertained. The gist of the action being damages, proof of pecuniary loss to the plaintiff was necessary; and until the inquiry directed by the order was made, the loss, if any, could not be ascertained.

Two points were argued before us; both are covered by authority. *Peek* v. *Gurney* (1) shows that this is an action for a wrong to which the rule *actio personalis moritur cum persona* applies, and *Phillips* v. *Homfray* (2) shows that it could not be maintained against the personal representative of the wrongdoer without proof that property, or the proceeds or value of property, belonging to the plaintiff, had been appropriated by the deceased and added to his estate. This is also decided by *In re Duncan*; *Terry* v. *Sweeting* (3), which further decides that the fact that the deceased in his lifetime profited by his wrong is not enough to make his personal representative liable to be sued after his death.

(1) L. R. 6 H. L. 377. (2) 24 Ch. D. 439; 11 App. Cas. 466.
(3) [1899] 1 Ch. 387.

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Phillips v. *Homfray* (1) also decided, under similar circumstances, that a decree in the same form as here, where an inquiry has still to be made to ascertain the amount of damages, is not a final judgment conferring rights on the plaintiff against the estate or the representatives of a defendant who, by passing the gate of death, has got out of the reach of the decree. The remedy of the plaintiff against Wootton was still mortal when he Wootton died, and it died with him, because the action had not yet resulted in a final judgment for an ascertained debt.

Without attempting to give an exhaustive definition of the class of cases to which the rule *actio personalis moritur cum persona* does not apply, the following tests may be suggested. If the assets of a deceased person have been specifically diminished by the cause of action, his personal representatives may, after his death, institute or continue an action to recoup them. The decision of this Court in *Johnston* v. *Great Northern Railway Company* (2), that the executor can recover pecuniary loss to the assets, after compensation for the death has been recovered under Lord Campbell's Act, is a case in point. The test as regards a defendant is analogous. Something must be found in the assets which are in the hands of the personal representative, which is specifically liable to answer the plaintiff's demand. It may either be the plaintiff's money, in which case an action for money had and received will lie, the money being in law the money of the plaintiff, or the proceeds or value of the plaintiff's property must be traced to the hands of the personal representative, and they can then be recovered by an "action on the case." We cannot define the evidence which will be sufficient to prove such an increase of the assets of a deceased wrongdoer as will be recoverable from his personal representative. But, in the present action, it cannot be said that there is any evidence which can enable the plaintiff to follow the money which he paid for his shares into Wootton's assets, or to get it back out of those assets. A sum of £30 was paid by the plaintiff, not to Wootton, but to a Company which he alleges to have been fraudulently promoted by Wootton and the other defendants. This £30 was part of a sum of £150,000 sub-

(1) 24 Ch. D. 439; 11 App. Cas. 466. (2) 26 L. R. Ir. 691.

scribed by the public. Wootton, if he were alive, would no doubt have to answer, upon proof of the fraud, as a joint wrongdoer, for the whole amount, whether he was worth a farthing or a million. But why? Because he had done a wrong. But as against his assets, the action could lie against his executrix, if at all, only to the extent by which his assets have been increased by the wrong done to the plaintiff. An inquiry to ascertain what part of Wootton's assets is derived from the £30 paid by the plaintiff to the Company would show the absurdity of holding this action to be within the class to which the maxim *actio personalis moritur cum persona* does not apply, on the pretext of following the plaintiff's money into the assets. Wootton got some £4000 at the outside out of the £150,000. How much of this was spent by him, or how he spent it, does not appear, and at most he got $\frac{4}{150}$ of £30, as his share of the plaintiff's money? How, then, can his assets be held liable to repay the whole £30, less by the value of the plaintiff's shares?

To prevent difficulty in the future from our having entertained this motion, I think it right to say that I entertain the gravest doubts whether this Court has any jurisdiction to deal with it. I entertain great doubt whether this discussion has not been going on in the wrong Court. The only order that I can find to have been ever made by a Court of Appeal, under circumstances like the present, is an order to strike out the appeal. The appeal is not a stay of execution upon, and does not affect, the judgment of the Court below. Until the appeal is decided, whether the appellant lives or dies, the opposite party may exercise all his rights under the order of the Court below. If, by reason of the appellant's death, or for any other reason, the appeal is not prosecuted, the respondent is entitled to be set free from any further difficulty which may be caused by its having been brought, and the proper mode of attaining this object would, in my opinion, be after a reasonable time to serve notice, upon whoever represents the deceased appellant, to prosecute the appeal, or failing that, to apply to the Court of Appeal to strike it out. Such a motion would not be necessary in a case in which the right of appeal did not survive. When the appeal is struck out there is an end of it, and the respondent can act on the order of the Court below, as

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if no appeal had been taken. But for revivor, or for any relief which may be required for giving effect to the order, application should be made, not to this Court, but to the Master of the Rolls, and in this case he has materials to act upon which we have not. The execution of his decree was stayed upon undertakings, consents, and terms, which are not fully before us. It seems to me that we ought not to deal with these matters at all. I do not wish to throw any doubt upon the power of the Master of the Rolls to deal with the £1600 which was lodged in Court, under the order staying further proceedings before him pending this appeal. That sum was brought in to abide the order of the Court of first instance, whether the parties lived or died. I also wish to be distinctly understood as deciding nothing about the liability of Wootton's assets to the costs of the action, although my impression is that the decree is just as interlocutory and incomplete with respect to those costs as it is with respect to the damages; but this does not affect the question of the power of the Master of the Rolls to dispose of the £1600.

I make these remarks only for caution against making this case a precedent. I have no desire to shirk the responsibility of deciding the questions which we have heard upon the present motion, at the request of both parties, and our having done so will at least prevent the case from coming back to us, as it probably would have done, if we had refused to consider the question of the liability of the executrix now.

WALKER, L.J.:—

I concur. This is admittedly an action for deceit. It is an action brought not to recover property or the proceeds of property, but to recover damages for injury done. In such cases, even though the wrongdoer has in his lifetime benefited by the wrong he has done, the rule is that the action dies with him. The principle to be collected from *Peek* v. *Gurney* (1), *Phillips* v. *Homfray* (2), and *In re Duncan, Terry* v. *Sweeting* (3), entirely covers this case. I cannot distinguish *Peek* v. *Gurney* (1): the

(1) L. R. 13 Eq. 79; 6 H. L. 377. (2) 24 Ch. D. 439; 11 App. Cas. 466.
(3) [1899] 1 Ch. 387.

allegations in the plaintiff's pleadings in that action and in the present case are almost identical. *Phillips* v. *Homfray* (1) also is extremely like the case before us. That was an action of *tort*, in which there was, as here, a final judgment entered against a defendant in his lifetime, wanting completeness only in that it directed inquiries to ascertain the amount of damages sustained by the defendant in respect of the wrong done to him; and it was held that the death of the defendant before the inquiries were opened put an end to all liability on his part. These two decisions are binding upon us, and in following them we can only decide as Romer, J., decided under circumstances almost precisely similar in *Re Duncan, Terry* v. *Sweeting* (2), that as against the deceased appellant the action of deceit died at his death.

I entirely agree in what has been said by Fitz Gibbon, L.J., as to the £1600 lodged in Court. It was brought into Court to cover all risks, and the risk of one of the parties dying may, I think, be included in the group of risks.

As to the deceased defendant's liability to costs there may be some difficulty, but I am not expressing any opinion upon this point which is not before us.

HOLMES, L.J.:—

The result of this application depends—1, on the nature of the action; and, 2, on the nature of the judgment of the Master of the Rolls.

As to the action I agree with what has been said about it by Lord Justice Walker. The statement of claim alleges that the defendants combined to make certain false and fraudulent representations with the object of inducing members of the public to subscribe for shares in a joint stock company, and that the plaintiff by reason thereof applied for and was allotted shares whereby he suffered pecuniary loss. Such a cause of action seems to me to be a typical instance of the cause of action that dies with the death of the defendant. Counsel for the plaintiff have attempted to show that the money of their client has by means of

(1) 24 Ch. D. 439; 11 App. Cas. 466. (2) [1899] 1 Ch. 387.

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the fraudulent representation been transferred to the pockets of the deceased defendant, and that an action to recover such money survives. It may happen that a person by deceit and fraud induces another to purchase from him shares that are wholly worthless; and in such a case an action to recover the price might lie against the personal representative of the vendor. But neither the pleadings nor the facts of the present case would support an action of that kind. The defendants received no money from the plaintiff, nor is it essential to the success of the latter that the defendants profited even indirectly by the transaction. Moreover, the plaintiff seeks to recover damages, not a liquidated amount. If it can be shown that the defendant Wootton died at any time after the cause of action arose and before the plaintiff had obtained a final and complete judgment, the plaintiff has lost his remedy against both the deceased and his assets; but, if before his death, the claim for damages for the wrong alleged to be done had been converted into a judgment debt, this debt does not die, but can be enforced against his property.

The question remains whether the judgment of the Master of the Rolls is of this character. I think not. It resembles an interlocutory judgment which is, admittedly, insufficient to preserve a cause of action that would not otherwise have survived. It does not declare any sum to be due; and no action of debt could be brought, nor could execution issue thereon. It leaves something more to be litigated before the defendant's liability is finally ascertained; and the death of Wootton has closed the litigation as far as he or his representative is concerned. I am therefore of opinion that the appeal taken by him cannot be revived.

It seems to follow from what is now decided that execution for the costs awarded by the judgment cannot issue against his assets, but this is not before us at present; and I only refer to it for the purpose of adding that I see no reason for thinking that the large sum of money lodged in Court will not be available for all such costs as the plaintiff, if he ultimately succeeds, will be declared entitled to.

I may also say that I do not share Lord Justice Fitz Gibbon's doubts as to the jurisdiction of the Court to hear this application.

I think that if pending an appeal either the appellant or respondent dies, this Court has jurisdiction if the right and liability survive, to order that the appeal be proceeded with by or against the persons upon whom the right or liability devolves.

Solicitors for the executrix of Mr. Wootton: *D. & T. Fitzgerald.*
Solicitors for the plaintiff: *Horan & Shortt.*

G. Y. D.

THE BRITISH INSULATED WIRE COMPANY *v.* THE DUBLIN UNITED TRAMWAYS COMPANY AND OTHERS.

(1898. No. 1057.)

Patent — Infringement — Importation of patented articles before and after expiration of patent—Loss—Measure of damages.

The plaintiffs were the owners of a patent of the United Kingdom for improvements in the insulation of electric cables. The defendant Company entered into a contract, during the continuance of the patent, with an American Company for the supply of cables, similar to those protected by the patent, some of which were delivered to the defendant Company during the continuance of the patent, the remainder being delivered after its expiration.

It was conceded at the trial that the delivery of cables by the American Company to the defendants during the continuance of the patent constituted an infringement, but a question having arisen as to how the damages were to be measured:—

Held, that the damages should be awarded only upon the cables actually delivered during the continuance of the patent, and should not be extended to the whole profit which might have been made if the contract had been entered into with the plaintiffs instead of with the American Company.

THE plaintiffs were the owners of a patent of the United Kingdom for improvements in the insulation of electric conductors, applicable to the manufacture of compound conductors for telephonic and other purposes. The patent expired on the 2nd September, 1898.

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BRITISH INSULATED WIRE CO. v. DUBLIN UNITED TRAMWAYS CO.

The defendants were the Dublin United Tramways Company, and the National Conduit and Cable Company of New York. On the 15th October, 1897, the Tramway Company invited the plaintiffs to send in a tender for the supply of insulated cables, and the following month the tender was sent in, but was not accepted. Subsequently the Dublin United Tramway Company entered into a contract with the New York Company, during the continuance of the patent, for the supply of electric cables insulated in exact accordance with the method of insulation patented by the plaintiffs. A small quantity of insulated cables was actually imported into Ireland before the expiration of the plaintiffs' patent, and used by the Tramway Company, and from time to time after the expiration of the patent further quantities of insulated cables were brought in.

On the 10th September, 1898, eight days after the expiration of the patent, the plaintiffs instituted the present action, in which they claimed an injunction (which, however, was not pressed at the trial), and an inquiry as to the damages sustained by them by reason of the infringement of their patent.

The defendants admitted their liability for damages, but claimed that the measure of damages should be restricted to such insulated cables as were actually imported and used by the defendants prior to the expiration of the patent. The plaintiffs' contention was that the damages should be measured by the loss of profits which would have accrued to them, had they obtained the benefit of the contract for the supply of insulated cables to the defendant Tramway Company.

The Solicitor-General (*Barton, Q.C.*), *Blood, Q.C.*, and *Gerald Fitz Gibbon*, for the plaintiffs :—

The damages should be measured not by the number of cables, imported and used by the defendants, before the expiration of the patent, but by the loss of profits that would have accrued to the plaintiffs, had they obtained the benefit of the contract for which they tendered : *American Braided Wire Company* v. *Thompson* (1) ; *United Horse-shoe and Nail Company* v. *Stewart* (2).

(1) 44 Ch. D. 274. (2) 13 App. Cas. 401.

Ronan, Q.C., Gordon, Q.C., and *Fitzgerald Murphy*, for the defendants :—

The claim on the writ of summons was for an injunction; but the patent expired eight days before the service of the writ, and therefore so far as the injunction is concerned the action fails: *Betts* v. *Gallais* (1).

To sustain a claim for damages, it is necessary to show that the patented articles were manufactured, vended, or used, within the jurisdiction. In the present case the claim for damages can only be sustained on the ground of user, and the measure of damages must be the actual supply of insulated cables to the Tramway Company before the expiration of the patent. The damages cannot be ascertained on the basis that large profits would have been made by the Tramway Company had their tender for the contract been accepted. Such a question could only arise, where the damages claimed were in respect of a breach of a subsisting contract, entered into during the continuance of the patent. The cases cited for the plaintiffs were all cases where the damages were caused by the lowering of prices due to competition, brought about by the wrongful acts of the defendants; but there was an actual subsisting patent during the sales, and up to the time of the action. There is no such case where the contract was entered into outside the jurisdiction, or where the sales were effected after the expiration of the patent. [They also cited *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler* (2).]

Blood, Q.C., in reply :—

Even after the expiration of a patent an action will lie for an injunction: *Crossley* v. *Derby Gas Light Company* (3); *Davenport* v. *Rylands* (4). These cases show that we would be entitled, if we chose to press for it, to an injunction to restrain the Tramway Company from using any cables made during the existence of the patent.

As regards the assessment of damages, damages must be the direct consequence of the acts complained of, *i.e.* the loss by us of

(1) L. R. 10 Eq. 392.
(2) [1898] App. Cas. 200.
(3) 4 L. J. Ch. (N. S.) 25.
(4) L. R. 1 Eq. 302.

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the contract to supply the cables to the Tramway Company, which was the direct outcome of their conduct. *The American Braided Wire Company* v. *Thomson* (1) was a weaker case than the present; for in that case the subject-matter was merely a possibility of loss arising from competition.

THE VICE-CHANCELLOR:—

This action was brought for the purpose of obtaining an injunction to restrain the defendant Company from infringing a patent for the manufacture of insulated cables, and for damages. It arose out of a transaction on the part of the Tramway Company, who had purchased from an American Company a number of insulated cables, to be delivered to them in this country. The cables so to be supplied to them were admittedly identical with the cables protected by the patent of the plaintiffs; but the patent expired on the 2nd September, 1898, and this action was not instituted until after its expiration. A portion of these cables had been delivered before the expiration of the patent. The claim for an injunction, so far as it related to anything that occurred after the expiration of the patent, could not be sustained, and consequently the plaintiffs do not now ask for an injunction, but confine their claim to damages. The matter came first before the Vacation Judge on an interlocutory motion, who directed it to stand over for the trial of the action.

It was admitted by the Tramway Company in their defence, that they were not justified in bringing over such cables during the time the patent existed; and they consequently do not dispute the plaintiffs' right to damages so far, so that the question I must now decide is how the damages, admitted to be due, are to be measured. It is contended by the defendants that damages should be awarded only upon the cables actually delivered during the continuance of the patent, while the plaintiffs contend that they should be extended to the whole profit which might have been made, if the defendants had contracted with them instead of with the American Company, on all cables manufactured by them for

(1) 44 Ch. D. 274.

the defendants before the expiration of the patent, at whatever time they were delivered. I consider that the damages must be confined to any resulting from the supply of cables by the American Company to the defendants, which were delivered to the defendants before the expiration of the patent. I do not think that the entering into the contract was any infringement of the patent, but that the supply of the cables in pursuance of such contract was. Beyond this the plaintiffs' claim is, in my opinion, unsustained. I am clearly of opinion, that so far as any cables were brought into this country before the expiration of the patent, it was an infringement for which the Tramway Company are responsible in damages, and I direct the amount of such damages should be ascertained, and the amount so ascertained to be awarded to the plaintiffs.

The other question, which remains to be disposed of, is the question of costs. The original action for an injunction was not rightly framed, and, therefore, I think it must be dismissed with costs, so far as it prays such injunction. The right to damages remains, and there must be an inquiry such as I have mentioned.

Solicitors for the plaintiffs: *D. & T. Fitzgerald.*
Solicitors for the defendants: *Casey & Clay.*

J. MAC M.

V.-C.
1900.

March 21,
27.

In re LUCAS, Deceased; PARR *v.* BLAIR.

(1898. No. 953.)

Administration—Administrator—Surety bond—Premium paid to insurance company—Allowance out of estate.

Where a person who is entitled as of right to a grant of administration, but is otherwise unable to give justifying security, procures a surety bond from an insurance company, and pays a premium thereon, it is within the discretion of the Court to allow the amount of such premium out of the general personal estate, where the circumstances of the case show that reliable security could not otherwise be obtained, and that the course adopted was reasonable and proper, and for the interest of all parties entitled to the assets.

Summons to vary the Chief Clerk's certificate.

Leonard Lucas died intestate and without issue on the 25th March, 1898, leaving personalty to the value of about £26,999 10*s*. The next of kin of the deceased were persons in an humble rank of life, and were unable to furnish the security necessary for obtaining letters of administration. Accordingly, a surety bond was procured from an insurance company by the defendant, Anna Clara Blair, a niece of the deceased, and a premium on foot thereof of £60 was paid by her to the Company. This security was accepted, and letters of administration were duly granted to the defendant on the 22nd July, 1898.

On the 31st October, 1898, an order was made for the administration of the personal estate of the deceased. The Chief Clerk refused to allow the above-mentioned sum of £60 to the defendant out of the general personal estate, and the defendant accordingly applied in the present summons to have the certificate varied and the sum allowed.

The Vice-Chancellor, after hearing counsel on both sides, adjourned the summons for the purpose of ascertaining the practice prevailing in the Court of the Master of the Rolls. The official of the Court furnished a report to the effect that a premium paid

to an insurance company on foot of a surety bond had never been allowed out of the estate without the consent of all the parties interested, except on one occasion under very special circumstances.

Matheson, Q.C. (with him *Corvan*), for the defendant in support of the application:—

Having regard to the large sum involved, and the satisfactory manner in which it has been accounted for by the defendant, and to the rank in life and circumstances of the next-of-kin, who were quite unable to find the security necessary to obtain a grant of administration, except through the medium of an insurance company, it seems reasonable that the amount expended on the payment of the premium should be allowed the defendant. It was clearly an expenditure beneficial to all persons interested in the estate.

Brown, Q.C., for the plaintiff, resisted the application:—

It is contrary to the settled practice of the Court to allow a premium paid to an insurance company on foot of a surety bond, unless with the consent of all persons interested in the assets.

March 27.

THE VICE-CHANCELLOR:—

I accede to this application; and I do so, not upon any special circumstances connected with this case, but upon a general principle applicable to all cases like the present, where an intestate leaves a considerable amount of personal estate, and where the next-of-kin are persons in an humble rank of life. These persons, or some one or more of them, are entitled to obtain a grant of administration as of right, and are bound to give justifying security for its due administration. The Probate Division has no means of ascertaining in most cases, whether the sureties in the administration bond are solvent. That Division does all that lies in its power to protect the assets, and impounds the grant of administration, till a proceeding is instituted in the Chancery Division, or a Civil Bill Court of adequate jurisdiction, and an order for administration made, and an order obtained from the

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Court in which the administration is proceeding to deliver out the letters of administration. Notwithstanding these precautions, it frequently happens, that large balances are found to be due by the administrator, which he has not the means of paying. An order is then obtained to put the administration bond in suit against the administrator and his sureties, and it very frequently is found that none of them is solvent, and the balances are lost. Under these circumstances, it is manifestly for the benefit of all parties interested that solvent sureties shall, if possible, be obtained. Private individuals hate suretyships as a rule; but insurance companies of undoubted solvency can generally be found to guarantee against such losses, for a sum not by any means exorbitant. In cases where reliable security cannot otherwise be procured, I consider it to be for the interest of all parties entitled to the assets, whether as creditors or beneficiaries, that the security of an insurance company, or some equally solvent surety, should be procured at the expense of the estate. Of course, when the administrator comes to be allowed this credit, he must satisfy the Court that it was a proper and reasonable thing for him to have done; and if it should appear to have been done unnecessarily or improperly, it should be disallowed.

I consider that in this case it was a proper and prudent thing to obtain this guarantee, and that the costs of so doing should be allowed to the administrator.

Costs out of personal estate.

Solicitor for the plaintiff: *Jackson.*

Solicitors for the defendant: *Sutton & Son.*

J. MAC M.

IN THE MATTER OF THE ESTATE OF ELLEN M'DONNELL, OWNER; EX PARTE FRANCIS J. P. QUINLAN, PETITIONER.

Ross, J.
1900.
March 13, 16.

Salvage — Costs incurred by mortgagee, also owner of worthless equity of redemption, in reversing order of Sub-Commission reducing the rent of a tenant on the estate.

Costs incurred by a mortgagee in successfully appealing against an order of a Sub-Commission Court reducing the rent of a tenant on the estate, constitute a good salvage claim; and the fact that the mortgagee became the owner of the equity of redemption—which was worthless—does not alter the position of the salvagor.

UPON this case coming on for the settlement of the Final Schedule of Incumbrances, Messrs. Hayes & Son, the solicitors for the owner, applied for an order that they might be declared entitled to the costs incurred by them on behalf of the owner in defending the proceedings taken by Patrick Richard Norton the tenant on the estate in this matter in the Court of the Irish Land Commission when seeking to have a fair rent fixed, including the costs of the rehearing before the Chief Land Commission, and the defending the appeal of Patrick Richard Norton to Her Majesty's Court of Appeal (1) as between solicitor and client; and that such costs, when taxed and ascertained, should be paid to them out of the funds to the credit of the matter in the proper priority.

The Final Schedule, as framed, after providing for the costs of sale, set out, No. 6, a mortgage of the 19th January, 1874, from William M'Donnell to James W. Norton as trustee for Patrick Richard Norton, to secure £1500; and Ellen M'Donnell (the present owner), Kate M'Donnell, and Patrick A. Smith joined therein, and postponed any claims or charges they might have on the lands by reason of legacies, debts, or otherwise: and No. 7

(1) [1899] 2 I. R. 51, 70.

Ross, J. 1900. *In re* M'Donnell's Estate.

was a further mortgage dated the 17th September, 1877, to the same party; and Ellen M'Donnell, Kate M'Donnell, and Patrick A. Smith joined in it also to effect a similar postponement. These two mortgages were assigned to the Bank of Ireland. By a deed dated 11th October, 1877, William M'Donnell mortgaged the lands to Ellen M'Donnell and Catherine M'Donnell to secure a sum of £1999 4*s.* The further circumstances of the case material to this report appear sufficiently from the judgment.

Pim, for the petitioner having carriage.

Oulton, for Messrs. Hayes & Sons :—

These costs were incurred by Ellen M'Donnell as mortgagee, and they increased the value of the estate; therefore they constitute a good salvage claim; besides, Ellen M'Donnell was given leave by the Court in the Chancery action of *Quinlan* v. *M'Donnell* to resist the tenant's application, and also to appeal.

[The following cases were cited: *Fetherstone* v. *Mitchell* (1); *Leslie* v. *French* (2); *In re Power's Policies* (3); *Hamilton* v. *Tighe* (4); *Warnock* v. *Leslie* (5).]

M'Cann, for Norton :—

Here the person whose solicitors are making the application is not merely a *puisne* mortgagee, but also mortgagor; for she postponed her legacies and debts, that is an equitable assignment: *In re Armstrong* (6); *Leigh* v. *Burnett* (7); *Falcke* v. *Scottish Imperial Insurance Company* (8); *Saunders* v. *Dunman* (9).

March 16.

Ross, J. :—

The facts of this case are briefly as follows :—A tenant called Norton held the lands for sale in this matter under a lease from the late owner, William M'Donnell, at a rent of £1031 11*s.* 3*d.* William M'Donnell held the lands under a lease for lives at a rent

(1) 11 Ir. Eq. R. 35.
(2) 23 Ch. D. 552.
(3) [1899] 1 I. R. 6.
(4) [1898] 1 I. R. 123.
(5) 10 L. R. Ir. 68.
(6) [1895] 1 I. R. 87.
(7) 29 Ch. D. 231.
(8) 34 Ch. D. 234.
(9) 7 Ch. D. 825.

of £576. The profit rent was therefore £455 11*s.* 3*d.* The tenant Norton served an originating notice to have a fair rent fixed. He succeeded before the Sub-Commission; the result was that the profit rent was reduced to £259 instead of £455 11*s.* 3*d.* Ellen M'Donnell, who has a mortgage on the estate *puisne* to Norton, became also owner of the estate on the death of William M'Donnell. Her charge will not be paid in full. She appealed from the decision of the Sub-Commission to the Chief Commissioners. They set aside the order. The tenant appealed. Ellen M'Donnell opposed him in the Court of Appeal, and succeeded in sustaining the order of the Chief Commissioners. As a matter of fact the tenant was ultimately the purchaser of the lands at £3500. It is idle to assert, however, that these proceedings were not of great value to the estate. The tenant might never have bought if the Sub-Commissioners' order had not been challenged. The expense at all events was *bona fide* incurred to save the estate from being cut down to nearly half its value, with the prospect of being further cut down on the termination of successive periods of fifteen years. The head-rent would, of course, always remain the same. As there seems to be some difference between the English and Irish Courts on this question of what we have been in the habit of calling salvage, I think it best to follow closely the last Irish decision of the Court of Appeal: *In re Power's Policies* (1). Without giving the special facts of that case, the conditions laid down as necessary to a good salvage payment (as far as they are applicable to the present case) are three:—1, it must save the property; 2, it must be made by a person having a charge on or interest in the property saved; and 3, it must be made voluntarily for the salvagor's own advantage. All these conditions exist here. But it is said that Ellen M'Donnell is owner of the estate; therefore the expense incurred was for her interest as owner. It is plain that she has no interest as owner whatever. The first mortgage, and her own, the second, will more than exhaust the fund. If the estate had not devolved on her this would be a salvage payment. How can she be prevented, as mortgagee, from protecting her security because an absolutely worthless equity

(1) [1899] 1 I. R. 6.

Ross, J. 1900. *In re* M'Donnell's Estate.

of redemption has devolved upon her? Her action must be referred to her *status* as mortgagee, in which capacity she had a valuable interest, not to her *status* as owner in which she had no interest whatever. I am unable to agree with Mr. M'Cann's contention that because she postponed her charge in favour of the first incumbrancer, which postponement takes effect by way of equitable assignment, that therefore she is in effect a mortgagor.

I therefore declare her entitled to the costs of these proceedings when taxed, in priority to all incumbrances.

Solicitor having carriage: *John Malcolmson.*
Solicitors for the owner: *Hayes & Sons.*
Solicitors for Norton: *Maxwell & Weldon.*

W. C. S.

V.-C. 1900. May 15.

In re NEPEAN'S SETTLED ESTATE.

(1898. No. 1330.)

Settled land—Instalment mortgage—Tenants for life—Payment of instalments—Sale—Deficiency of proceeds—Rateable repayment.

A testator devised certain lands, subject to an instalment mortgage, to his wife for life, remainder to his children for life, remainder over. After the testator's death his widow paid several instalments on foot of the mortgage. She died intestate, and further instalments were then paid by the other tenants for life. The lands were sold under the Settled Land Act, and the balance of the mortgage paid off out of the proceeds; and by an order of the Court the tenants for life were declared entitled to be recouped the sums, expended by them on foot of the mortgage, out of the remaining surplus of the purchase-money. The fund proving insufficient to repay the tenants for life in full:—

Held, that the several tenants for life were entitled to be recouped rateably, the first tenant for life having no right to be repaid the sums, expended by her on foot of the mortgage, in priority to the other tenants for life.

By deed bearing date the 11th July, 1872, made between Henry Pope of the one part and Alfred De Hochepied Nepean of

the other, certain premises known as Lower Park, Queenstown, were with other lands mortgaged to secure the sum of £2900 with interest. It was also provided that the principal sum should be repaid by yearly instalments of £131 10*s.*

Alfred De H. Nepean paid one sum of £50 on account of the instalments up to the year 1881, when he subsequently paid the sum of £332 12*s.* 2*d.* to the executors of the mortgagee Henry Pope. He died on the 25th April, 1882, leaving the sum of £2517 7*s.* 10*d.* due for principal. Under his will, dated the 27th July, 1872, his widow, Elizabeth Jane Nepean, became entitled to the receipt of the rents of the said property for her life, subject, however, to the mortgage. She paid certain instalments from July, 1882, up to her death in July, 1889, making in all the sum of £789. At the time of her death the sum due for principal amounted to £1728 7*s.* 10*d.* Under the provisions of the above-mentioned will the testator's four children became entitled, on the death of the widow, for their respective lives, to the rents and profits of the Lower Park estate in the following proportions, viz. Elizabeth Geraldine Nepean and Florence Adelaide Nepean to three-tenths respectively; and Alfred O. De B. Nepean and Evan St. Maur Nepean to two-tenths, respectively; with remainder to their respective children. Elizabeth Geraldine Nepean married Alexander Thomas, and died on 22nd July, 1897, intestate, leaving two children, who thereupon became entitled under the limitations of the will to her interest in the aforesaid property in equal shares. From the 24th July, 1892, down to the year 1898, several instalments were paid on foot of the mortgage, in all amounting to £790 6*s.* 6*d.*, by the tenants for life through their agent.

By an order dated the 19th January, 1899, William J. Houston, of Bellevue, Queenstown, Co. Cork, and William H. Roper of 59, Dawson-street, Dublin, were appointed trustees for the purpose of a sale under the Settled Land Act; and it was further ordered that the proceeds of the sale, after paying all incumbrances and costs of sale, should be lodged in Court. The estate was sold in December, 1898, and realised £2008, out of which sum the balance still remaining due on foot of the mortgage was paid off. By a further order dated 19th July, 1899, made on a summons on which the infant remaindermen were, by direction of the Court,

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In re NEPEAN'S SETTLED ESTATE.

represented by counsel, it was declared that the tenants for life or their representatives were entitled to be recouped out of the purchase-money all sums paid by them out of the rents, received during their respective life estates, towards paying off the principal, money secured by the mortgage. The surplus, however, of the purchase-money, remaining over after the mortgage was paid off, was insufficient to recoup the tenants for life in full.

On a summons to allocate the surplus of the purchase-money the present question arose, as to whether the representative of the first tenant for life, Mrs. Nepean, who had died intestate, was entitled to be repaid the sums, expended by her on foot of the mortgage, in priority to the other tenants for life, or whether all the tenants for life should be recouped rateably.

W. Green, for the representative of Mrs. Nepean :—

The several tenants for life on paying sums on foot of the mortgage acquired an equitable interest *pro tanto* in the estate : *Burrell* v. *Lord Egremont* (1) : as contradistinguished from a mere equity, requiring an order of the Court to give effect to it : *Cave* v. *Cave* (2). The priority, in which the tenants for life are to be repaid, must be determined according to priority of time, *i.e.* in the present case the order of time in which each instalment was paid. There can be no suggestion of any superior equity in the tenants for life in remainder, and consequently the representative of Mrs. Nepean is entitled to be paid the amount expended by her on foot of the mortgage in priority to the other tenants for life.

T. Henry Maxwell, for Alexander Thomas :—

The tenants for life are entitled to stand in the shoes of the mortgagee, when the whole and not merely a part of the mortgage had been paid off. A mortgagor must pay the entire amount due before he can require a reconveyance. Therefore the first tenant for life in the present case acquired no priority by reason of the payments made by her, and, consequently, her representative is only entitled to be recouped rateably with the subsequent tenants

(1) 7 Beav. 205. (2) 15 Ch. D. 639.

for life, as the fund has proved insufficient. The fact that the mortgage was repayable by instalments makes no difference.

THE VICE-CHANCELLOR :—

The only question I have to decide is as to the relative priorities of the tenants for life, namely, whether the sum in Court is to be divided among them in order of priority, or whether it is to be paid to them rateably, in proportion to the payments made by them on foot of the mortgage. I am of opinion that it should be paid to them rateably and not according to priority. Each of the tenants for life, when they paid the money, became entitled to stand in the shoes of the mortgagee, and there was nothing to give any one of them a priority over the others.

For this reason I hold that the money in Court, after providing for the costs, must be divided rateably among the respective parties, in proportion to the sums paid by them on foot of the mortgage.

Solicitor for the representative of Mrs. Nepean : *M. G. Foley.*
Solicitor for Alexander Thomas : *Figgis.*
Solicitor for Florence Adelaide Nepean : *Wynne.*
Solicitor for the infant remaindermen : *R. A. Howe.*

J. MAC. M.

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Jan. 25, 26, 29.
Feb. 26.

ABERCROMBY *v.* TOWN COMMISSIONERS OF FERMOY (1).

(1898. No. 566.)

Easement—Custom—Dedication—Promenade—Right of inhabitants of district—Right of way on foot.

In an action brought by an owner in fee for a declaration of title to a strip of land on the bank of the River Blackwater, adjoining the town of Fermoy, called "The Barnane Walk," subject to a right of way on foot possessed by the public over the premises, the evidence adduced regarding the character and user of the premises showed that so long as memory went back it had been devoted to the recreation of the inhabitants of the town, by whom it was used as a promenade:—

Held, that the Town Commissioners of the town had no right to erect a barrier across the entrance to the walk, and that the owner in fee of the land subject to said right of the inhabitants of Fermoy could not encroach on the walk (*a*) by granting to his tenants of other lands abutting thereon a right to pass over the walk in carriages, unless such grant were subject to the condition that the use of the inhabitants should not be thereby interfered with, or (*b*) by converting the walk into a public road to be traversed by all kinds of vehicles.

Distinction between the right to use a place as a promenade possessed by the inhabitants of a district, and a right of way over a place on foot possessed by the public.

APPEAL from the judgment of the Vice-Chancellor given on the trial of an action to establish the title of the plaintiff to that part of the town of Fermoy called Barnane Walk, subject to a right of way for the public over the same, and for an injunction to compel the defendants to remove certain posts and chains erected and placed upon the said lands by the defendants, and that the defendants be restrained by injunction from erecting, or placing, or maintaining on said lands any posts, chains, or other obstruction or barrier.

The statement of claim set out the plaintiff's title to certain lands which included the Barnane Walk, and admitted that the

(1) Before LORD ASHBOURNE, C., FITZ GIBBON, and HOLMES, L.JJ.

said piece of land was subject to an easement of a right of way for the public over the same.

It averred that the defendants, the Town Commissioners of Fermoy, were acting under the Towns Improvement (Ireland) Act, 1854, and that some members of that body without any legal or statutable authority broke and entered on the said piece of land and dug holes on either side thereof, and fixed or planted in said holes, posts, or pillars, and stretched across the said piece of ground chains or bars connected with and fastened to the said posts for the purpose of constituting a barrier across the said piece of land, and had kept the same so erected in order to prevent the plaintiff and his tenants on lands abutting on the said piece of land from using the same in such manner as he or they might desire.

The plaintiff also averred that by the direction of the Town Commissioners two strong chains were attached to two posts previously fixed in the said walk, and formed an effective barrier against the use by the plaintiff, and his tenants, and persons authorised by him of the said piece of land; that a Mrs. Hodder, a tenant of the plaintiff, of land abutting on Barnane Walk, in the year 1897, contemplated building villa residences on her land which so abutted on Barnane Walk; that application on her behalf was made to the defendants to have the said barrier removed on the ground that it was a great inconvenience and serious injury to her property; that the plaintiff had also requested the defendants to remove the said barrier, but that the defendants had declined to remove the same.

The statement of claim also contained a series of averments made for the purpose of fixing upon certain of the Fermoy Commissioners, who were named as special defendants, a liability to pay the costs of the action, and concluded with a prayer for a declaration of title and for an injunction as above-mentioned, and also for an order that the special defendants should pay the costs of the action.

The defendants put in a defence putting the plaintiff upon proof of his title as alleged in the statement of claim, and saying "that the right of way therein alleged is a right of footway only, and that the public have not the right to pass over the Barnane

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Walk with horses, carriages, carts, or cycles, and that the defendants, as Commissioners of Fermoy, can take any steps necessary in the public interest to protect foot passengers in the exclusive user of the said walk."

The defendants also pleaded the following four defences :—

(*a*). The defendants say that before living memory the Commissioners of Fermoy have been in occupation of the ground where the alleged trespass was committed, and more than fifty years ago erected thereon a stone wall over which the public passed into or out of the Barnane Walk by high stone steps ; and the defendants aver that the same became and is vested in and passed to them, but the defendants admit that recently they, as the Commissioners of Fermoy, ordered the removal of the said wall temporarily in order to convenience Her Majesty's forces stationed in Fermoy, when the commanders of certain regiments applied to them for leave, pending the completion of the defendants' waterworks, to take water for men and horses from the river Blackwater, which flows by the Barnane Walk ; but defendants say that when the military no longer required such water by reason of the completion of the defendants' waterworks, the defendants ordered the re-erection of a barrier or chain across the said walk, so as to prevent rubbish and nuisance being deposited thereon, and to protect its uninterrupted user by foot passengers only, as heretofore. The said barrier was erected at the place where the wall previously stood across the said walk, which is the trespass complained of.

(*b*). In the alternative the defendants say that the Barnane Walk was never under Grand Jury Presentment as a road, and that when the said walk was taken over by their predecessors its charge and care was accepted solely upon the terms that the plaintiff and his predecessors (or the defendants in their default) should erect and maintain such a barrier on the town side of the said walk as would limit the use of the same to foot passengers, and that the Commissioners should not be required to maintain the said walk as a carriage-way or cart-way, or incur unnecessary cost by the removal of rubbish or nuisance which, in the absence of a barrier, might be deposited on the said walk, or thrown into the river Blackwater, whereby the said river might be fouled or made

shallow; and the defendants say that if the said walk were to be converted into a public road much additional expense would be thrown on the ratepayers of Fermoy; or, if the Commissioners did not maintain it as a public road the removal of the barrier would cause it to become an eyesore, and great danger to the public would also arise, as no parapet, fence, or rail exists along the river banks, and there are no public lamps on said walk, which is not fronted by any house; and the defendants submit that their legal liability in respect of the Barnane Walk should not be altered compulsorily by the plaintiff.

(*c*). As a further defence to the plaintiff's action, the defendants say that the dedication of the Barnane Walk to the public was as a walk only, and not as a road or cart-way, and that upon the faith of such limited dedication the defendants and their predecessors took over, cared, and managed the same, and caused the said walk to be included within the limits of their statutory jurisdiction as Commissioners, and accepted responsibility for scavenging and protecting the same, and erected seats thereon; and the defendants submit that such acceptance by them as aforesaid implied and implies on the part of the plaintiff an undertaking to permit the said walk to continue solely as a walk for foot passengers, with the right and jurisdiction in the defendants by the maintenance of barriers to prevent the same becoming a general thoroughfare for all purposes: and the defendants say that in re-erecting the barrier complained of they adopted the only means in their power to preserve the conditions upon which the Fermoy Town Commissioners originally accepted, or still undertake the care and management of the Barnane Walk.

(*d*). The defendants further aver as an alternative defence that the said walk not being macadamized for traction purposes, and not being walled in or fenced off from the river Blackwater, could not without great expense be made a public road, for which the defendants would become responsible if the barrier were removed, and that the removal of the barrier would lead to the destruction of the said walk as a walk for foot passengers for which it has hitherto been kept at the expense of the ratepayers of Fermoy; and the defendants aver that the said barrier is a necessary adjunct to the said walk to preserve its user as heretofore, and that the

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liability for the conversion of the said walk into a cart road cannot be cast on the defendants without their prior sanction and approval.

The plaintiff joined issue on this defence, and submitted that the defences (*a*), (*b*), (*c*), (*d*), above set out did not nor did any of them disclose any defence to the action.

The evidence is fully stated in the judgment of Lord Justice Holmes.

The action was tried before the Vice-Chancellor on the 10th and 11th May, 1899.

The curial portion of his Lordship's judgment, dated 11th May, 1899, was as follows :—

"This Court doth declare that the plaintiff is entitled as owner in fee to that part of the town of Fermoy called Barnane Walk, subject to a right of way for the public over same, and this Court doth order and adjudge that an injunction be awarded to compel the defendants to remove certain posts and chains erected and placed on the said lands by the defendants, and that a perpetual injunction be awarded to restrain the defendants and each of them, their and each of their servants, agents, and workmen, from erecting or placing on the said lands any posts or chains, or other obstruction, or barrier, &c."

From this judgment the Commissioners of Fermoy appealed.

Campbell, Q.C., and *Healy, Q.C.* (with them *George Green*), for the appellants :—

The defendants hold this piece of ground in trust for the inhabitants of Fermoy as a recreation ground and public promenade. The evidence shows that it was dedicated to this purpose by the plaintiff.

As there has been a continuous course of acts which require legal origin, the Court for the purpose of quieting possession will presume a lost grant to the Commissioners of Fermoy in trust for the inhabitants of the town : *Dyce* v. *Hay* (1) ; *Fitch* v. *Rawling* (2) ; *Goodman* v. *Mayor of Saltash* (3) ; *Angus* v. *Dalton* (4) ; *Deeble* v. *Linehan* (5). If this was a legal footway the defendants were bound to protect it : 48 Geo. 3, c. 45 (Ir.), ss. 15, 19, 22, 35, 47, 51, 93 ; *Coverdale* v. *Charlton* (6) ; Towns Improvement Clauses

(1) 1 MacQueen, 305.
(2) 2 H. Bl. 393.
(3) 7 App. Cas. 633.
(4) 6 App. Cas. 740.
(5) 12 Ir. Com. Law Rep. 1.
(6) 3 Q. B. D. 376 ; 4 Q. B. D. 104.

Act, 1847, s. 51, 52; Towns Improvement Act, 1854, s. 18; Public Health Act, 1878, ss. 28, 41; Public Health Act, 1890, s. 23.

The Solicitor-General (*George Wright*, Q. C.), *Matheson*, Q. C. (with them *Morphy*), for the plaintiff:—

The evidence here shows that the plaintiff only dedicated to the public a right of way on foot along the Barnane Walk. He has parted with no other right in respect of the land: *The Vestry of St. Mary, Newington, Appellant; Jacob, Respondent* (1). The defendants' posts prevent the plaintiff going on his own ground. The defendants have no statutory powers enabling them to acquire lands. They are not the proper parties to defend the right which they put forward as existing in the inhabitants of Fermoy.

There may be a dedication of a way to the public for a limited purpose such as we contend for here; but there cannot be a dedication to a limited part of the public: *Poole* v. *Huskinson* (2). *Vestry of Bermondsey* v. *Brown* (3).

The defendants must show a custom as the basis of the right they allege, and a custom assumes that the origin of the right is beyond memory. Here the evidence shows that this ground was in the possession of a tenant of the plaintiff's predecessors free from any rights in anybody else in the year 1795.

[They also cited *Clifford* v. *Hoare* (4); *The Queen* v. *Chorley* (5).]

Ronan, Q.C., for the special defendants, asked to be heard on the question of liability to costs before any order should be made against his clients.

LORD ASHBOURNE, C.:— Feb. 26.

Lord Justice Holmes will deliver the judgment of the Court.

HOLMES, L.J.:—

Fermoy is a good provincial town, pleasantly situated on the Blackwater, which is said to be the most picturesque of Irish rivers. The Barnane Walk, with which this action is conversant,

(1) L. R. 7 Q. B. 47.
(2) 11 M. & W. 827.
(3) 35 Beav. 226.
(4) L. R. 9 C. P. 362.
(5) 12 Q. B. 515.

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seems to be an attractive feature of the place. It begins in the town at a street called West-quay, and runs for about half-a-mile along the right bank of the river. It is somewhat curious that the oral evidence, while very abundant in reference to two or three matters of minor importance, gives hardly any description of the walk itself, or of the mode in which it has been used by the townspeople. It is said by counsel that its breadth varies from 8 to 12 yards; it keeps for its whole length close by the bank of the river; and the photographs produced show that it is shaded at least in some places by handsome trees. It has existed substantially in its present condition as long as living memory goes back; and a map dated 1795 shows a walk bearing a different name in the same situation, and apparently of the same width and length. It passes when it leaves West-quay for some distance through lands owned by the plaintiff, and for the remainder of its course through what is called in the evidence the Cliffe estate, which has not been connected in title with the plaintiff's property at least during the present century, and probably for long before. In the year 1837—the earliest date spoken to by any witness—West-quay and Barnane Walk were separated from each other by a dividing wall extending across the entrance to the latter, having in the centre a stile about 6 or 8 feet broad, and consisting of four steps on each side with a flat stone on the top. It does not appear when or by whom this barrier was erected; but there is evidence that it was rebuilt or repaired on one or two occasions by the predecessors in title of the plaintiff. At one time there was an opening in the wall at the south side of the stile through which a small cart could pass. An old witness, who I think is both truthful and accurate, says that this aperture first appeared and was probably caused by the action of a high flood in the year 1852; and I am not satisfied that it was ever subsequently closed; but the remainder of the wall continued to exist until it was removed in 1882, under circumstances to which I shall presently refer.

By a lease dated the 2nd February, 1835, the then owners of the property now vested in the plaintiff demised to Robert Briscoe for a term of lives renewable for ever a plot of ground extending from Barnane Walk southward to King-street. This plot does not include the walk itself, which is separated from it by a high

wall, and is in fact the northern boundary of the demised premises; nor was any right of way over it granted to the lessee in express terms. One or more houses were built on the land facing King-street; and there is a wicket gate or door in the boundary wall by which a garden or orchard at the rere of one of these houses can be entered from the walk. There was formerly another wicket leading to a cottage; but both the cottage and the entrance to it are now gone. The evidence regarding the end of the walk farthest from the town is wanting in precision. The maps show it as continuing at a fairly uniform width up to a certain point, and then terminating without any trace of way or path beyond. We have been told by counsel that there is a wooden barrier at this point; but the only evidence of this fact is an item of expenditure in the defendants' accounts, and one witness spoke of a beaten track leading from the end of the walk through the fields. It is not alleged, however, that the public has any right of way in this direction; and if people occasionally wander alongside the river, they probably do so by permission of the owner of the land, if they are not trespassers pure and simple. There seems to have been so little controversy at the trial as to the manner in which Barnane Walk was used by the inhabitants of Fermoy that only casual references to the mode of user can be found in the evidence. One witness states that it was a walk for the populace of the town, children, and all, and that there was a band on the river. Another says that it was maintained as a public walk; a third swears that for the forty-five years he has known the place it was used by the people of Fermoy. An old man tells that "often when the work was done, we went down there, and there were plenty there besides me." It also appears that there were seats upon the walk, some moveable and some fastened to the ground. There was no objection to perambulators passing over it; but when cyclists became aggressive, the defendants endeavoured to prevent them riding on it.

It is easy to understand from the foregoing evidence and facts, what have been the character and user of the walk as long as memory goes back. Indeed no better description of it can be given than what is contained in an agreement dated the 29th April, 1882, between Sir Robert John Abercromby, the then owner

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in fee-simple of the lands now belonging to the plaintiff, and the Fermoy Boat Club, by which the latter were given permission to erect a shed for the use of their boats on the Barnane Walk, subject to certain conditions, one of which was to preserve the entire walk from injury, "and to permit nothing to be done that should unfit it for the use and recreation of the inhabitants of the town by whom it is used as a promenade."

It seems to me that the only questions admitting of doubt that arise in this action are—1, whether the townspeople of Fermoy have any legal rights over the walk; and, 2, if so, what are the nature and extent of such rights?

An attempt was made on behalf of the plaintiff to show that it is and has been a public highway for carriages and other vehicles; and many witnesses were examined on this issue. It is difficult to see how it is relevant to the plaintiff's case; and even if it were he has failed to prove it. The existence of the wall across the entrance at the earliest date deposed to, and the fact that it was afterwards rebuilt or repaired by the owners of the soil in 1841 and 1850, its continuance until 1882, and its removal then not by such owner but by the Town Commissioners for a special purpose, are circumstances absolutely inconsistent either with a public highway for carriages by dedication or a private right of way for carriages acquired by lost grant or prescription.

Equally futile were the efforts of the Town Commissioners of Fermoy to show that they had such a property in or authority over the walk as justified them in erecting the posts and chains complained of by the plaintiff.

A local and personal Act of Parliament, passed in the year 1808, created in Fermoy a body of Commissioners who were authorised to fill up vacancies in their number by co-option, and who were invested with wide powers of control over the streets and ways in the town; but there is no proof that these Commissioners interfered at any time with Barnane Walk. Their records, if they kept records, are not forthcoming; and there is no other evidence on the subject. At a date not specified, but sometime between the years 1854 and 1861, the provisions of the Towns Improvement (Ireland) Act, 1854, were adopted with the consent of the old body of Commissioners, the effect of which,

according to the fifth section thereof, was to put an end to the operation of the local Act.

The Commissioners that have been since elected, pursuant to the provisions of the statute of 1854, seem from the first to have taken the walk under their management. They alone have kept it in repair, expending for this purpose considerable sums of money from time to time. The wall with the stile across the entrance, or what remained of it, was taken down by their direction in 1882, to allow the military to draw water out of the river higher up. Their permission was asked by the boat club before erecting the boathouse under the agreement already referred to. They placed seats on the walk for the use of the public. They took steps to keep it free from nuisance and from practices calculated to cause discomfort or annoyance: such as cycling, playing objectionable games, and bathing at unseasonable hours.

It is unnecessary to consider whether the control thus exercised was with or without authority. It was for the benefit of the town, and no one complained of it. The first time the action of the Commissioners in regard to Barnane Walk was objected to was the occasion that has led to the present litigation.

In August, 1896, it was resolved by the Commissioners to place a barrier at the entrance to Barnane Walk from West Quay. This subject came before the body on several occasions afterwards; but the resolution does not seem to have been acted on until the following year, when metal columns connected by horizontal chains, with openings on each side for foot-passengers, were erected near the site of the wall which had been removed in 1882. The only reasons given in the minute-book for the step thus taken were to prevent the deposit of broken glass bottles and other rubbish near the boathouse, and to put a stop to bicycle-riding on the walk. It is possible that there was a third reason, which, although not expressed, influenced the Commissioners at least as strongly as the other two.

The interest under the lease of 1835 has been for some time vested in a lady called Hodder, and about the date of the barrier resolutions she was contemplating building three or four houses on the demised premises, fronting towards the river, and to be approached from West Quay by the walk. The first of those

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houses was to have been begun in October, 1897; but the project was probably spoken of for some time before, and the townspeople not unnaturally were opposed to their promenade being used as a carriage-way to the new houses. Whether this had anything to do with the action of the Commissioners I am unable to say with certainty; but there is no doubt that Mr. Hodder in October, 1897, applied to them to have the barrier removed, as it was a great inconvenience and a serious injury to his wife's property. This application was refused, and as far as I can see Mr. Hodder was not in a position to compel the Commissioners to yield to it. The walk was not included in his lease, nor was a right to use it, with horses and carriages, given to the lessee either by express grant or as appurtenant to the demised lands. Mr. Hodder's request was followed a few weeks later by a peremptory demand on behalf of the plaintiff to take away the barrier; and as the Commissioners insisted on their right to retain it, the present action was instituted to establish the plaintiff's title to that part of the town of Fermoy called Barnane Walk, subject to a right of way for the public over the same, and to compel the defendants to remove the posts and chains.

I do not think that it was ever alleged by the defendants that the plaintiff is not the owner of the land which forms the walk up to the point where it enters the Cliffe Estate, and his title thereto has not been seriously disputed in the argument in this Court. I am also of opinion that the defendants have failed to show any right on their part to erect the posts and chains. Their only claim to do so is by the authority conferred upon them as Commissioners of Fermoy by the Towns Improvement (Ireland) Act, 1854, and by a Provisional Order transferring to them the powers and duties of the Grand Jury in respect of the roads within the town; and there is no provision in either the Towns Improvement or the Grand Jury code by which the acts complained of can be justified. Counsel referred to the 52nd section of the Commissioners' Clauses Act, 1847, incorporated with the statute of 1854; but that section is confined to placing fences and posts on the side of the footways of streets or in the carriage ways thereof, so as to make the crossing thereof less dangerous for foot-passengers; and it cannot be said that the

posts and chains at the entrance of Barnane Walk come under this enactment.

The remaining matter in controversy—the question to which the discussion here was almost exclusively directed—is the extent to which the dominion of the plaintiff over the walk is limited by rights acquired either by the public generally or by the inhabitants of Fermoy. A public right of way over it, that is to say, a right of way on foot is admitted in the pleadings and declared by the judgment of the Vice-Chancellor. This implies, according to the contention of the plaintiff, that while members of the public are entitled to walk from one end of it to the other and back, the plaintiff, provided he leaves sufficient space for two persons to pass each other, can use the remainder of the walk for any purpose he thinks fit. He may fence off a path four or five feet in width for the use of the public, and beyond its limits he may erect buildings, dig pits or raise crops. I am disposed to think that this would be in the plaintiff's power if the land is only subject to a public right of way; but I must add that if it were a matter for decision, I should have some difficulty in finding that such a right exists at all. There are three reasons for holding that it does not:—

1. It is well settled that although there may be a dedication of a way to the public for a limited purpose, there cannot be a dedication to a *limited part* of the public: *Poole* v. *Huskinson* (1). In the present case, all the evidence points to a dedication for the benefit of the people of Fermoy.

2. A public right of way, originating in dedication, generally means a right to the public to pass from one public place to another public place: *Campbell* v. *Lang* (2); and although the terminus of a public highway may be sufficient without having in the ordinary sense an exit, a mere private place not admitting of a passage through or beyond it, cannot be such a terminus: *Young* v. *Cuthbertson* (3). It is unnecessary for my present purpose to consider under what circumstances a *cul de sac* can be a public highway; but I may mention that before giving judgment in *The*

(1) 11 M. & W. 827. (2) 1 Macqueen, H. of L. 451.
(3) 1 Macqueen, H. of L. 455.

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Giants' Causeway Case (1) I sought in vain for an instance of the public being held entitled to a way terminating in private lands where such way was used for no other purpose than to enjoy a pleasant walk.

3. I am satisfied that the Barnane Walk was not used even by the inhabitants of Fermoy for the sake of reaching any definite point or place. The townspeople assembled on it as a place of recreation—to walk, to saunter, to lounge, to chat, to meet their friends.

Dedication of a public right of way cannot I think be inferred from user of this kind; but our law has always recognised that the people of a district—a town, a parish, or a hamlet—are capable of acquiring by dedication or custom, certain rights over land which cannot be gained by the general public. Lord St. Leonards in the case of *Dyce* v. *Lady James Hay* (2), pointed out the distinction, and illustrated it by village greens, and village playgrounds. Probably the young men and maidens of Fermoy have never at any period of their history danced round the maypole. Their sense of humour, if there was no other reason, has kept them from indulging in such "awful mirth." But legal principle does not require that rights of this nature should be limited to certain ancient pastimes. Popular amusement takes many shapes; and there is no outdoor recreation so general and perennial as the promenade. It may be asked how does this differ from a right of way. I think that it differs as much in legal conception as it certainly differs from it in point of fact. It implies that those who use the walk may wander over every portion of its surface, either in groups or in solitary meditation. It implies that the owner of the soil cannot encroach upon it in the manner contended for by the plaintiff's counsel. It implies, I should also think, that he could not convert it into a public road to be traversed by all kinds of vehicles; and that if he is at liberty to grant to individuals the right to pass over it with carriages, such grant must be subject to the condition that the use of it by the inhabitants of the town is

(1) Not reported. 14th Jan., 1898. There is a summary of this case in Vol. 32 of the Irish Law Times at p. 211.

(2) 1 Macqueen, H. of L. 305.

not to be interfered with thereby. I believe that this was not the view of the Vice-Chancellor, as I gather from his judgment that he was of opinion that the lands were only subject to an ordinary public right of way on foot.

I think, therefore, that his judgment should be amended by declaring that the plaintiff is entitled as owner in fee to that part of the town of Fermoy called Barnane Walk, as far as the boundary of the Cliffe estate, subject to the right of the inhabitants of the town to use it for their recreation as a promenade. I am of opinion that this alteration has an important bearing upon the principal issue in controversy between the parties. I have already indicated my opinion as to what its effect will be; and as the result is to place the inhabitants of the town, whose battle has been fought by the defendants in a much better position than that contended for by the plaintiff or given them by the judgment, I think that the plaintiff is not entitled to the costs of either the action or the appeal. At the same time, as the injunction stands, and as the appeal was taken from the judgment as a whole, he ought not to be obliged to pay the defendants' costs in either court. This determination renders it unnecessary to hear Mr. Ronan on the point which he asked to be left open.

Solicitor for the plaintiff: *St. Leger.*
Solicitor for the defendants: *Anthony Carroll.*

G. Y. D.

V.-C.
1900.
Jan. 29.

Appeal.
Feb. 23.

JOHNSON *v.* LOWRY AND OTHERS.

(1899. No. 649.)

Statute of Limitations—37 & 38 *Vict. c.* 57, *s.* 8—*Judgment*—*Judgment mortgage*—13 & 14 *Vict. c.* 29, *s.* 7.

Where a judgment creditor registers a judgment as a judgment mortgage against the lands of a judgment debtor:—

Held (by the Court of Appeal, reversing the decision of the Vice-Chancellor), that the Statute of Limitations commences to run from the date of the judgment, and not from the date of the registration of the judgment mortgage.

On the 27th of October, 1884, the plaintiff obtained a judgment against the defendants for the sum of £100 and £7 18*s.* for costs.

On the 16th of February, 1889, the plaintiff converted the judgment into a judgment mortgage over the defendants' interests as tenants from year to year in the lands of Killismestha, containing 36A. 6P., at the yearly rent of £33 4*s.* 6*d*, the lands of Ballyglass, containing 52A. 3R. 17P., and also the lands of Castlequarter, containing 8A. 2R. 11P., both held in fee-simple, but subject to annuities payable to the Land Commission.

No payment had been made on foot of the judgment, or acknowledgment in writing given, by the defendants for a period of twelve years, and the defendants' contention was, that the judgment and the judgment mortgage founded thereon were barred by the Statute of Limitations.

The question was raised on an originating summons, taken out by the plaintiff, asking for an account and a declaration that the amount found due might be declared well charged on the defendants' interests in the lands.

Herbert Wilson, for the plaintiff:—

The registration of the judgment as a judgment mortgage amounts to an acknowledgment, sufficient to satisfy the statute. Apart, however, from that question, the words of section 7 of the

Judgment Mortgage Act are plain, declaring that a judgment creditor, registering his judgment as a judgment mortgage, shall have all the rights, powers, and remedies, as if an effectual conveyance had been made to him. The judgment mortgagee is in the same position, as if a mortgage had been obtained to secure the amount of the judgment: see the observations of Lord Cranworth in *Eyre* v. *M'Dowell* (1), and of Brady, L. C., in *Ex parte Collins* (2).

Brunskill, for the defendants:—

Registration of the affidavit does not secure the money: the money is already secured by the judgment. The judgment mortgage only gives an additional remedy against the lands of the debtor. Once the judgment on which the judgment mortgage depends is barred, all rights under the judgment mortgage are likewise barred: *Knipe* v. *Blair* (3). In that case *Ex parte Collins* (2) was cited to Ashbourne, C., who, however, expressed a contrary opinion.

[He also referred to *Evans* v. *O'Donnell* (4) and *Henry* v. *Smith* (5).]

THE VICE-CHANCELLOR:—

It would, in my opinion, be impossible to give effect to the words of the section, if I were to hold that the Statute of Limitations commenced to run from the date of the judgment, and not from the date of the registration of the affidavit. The proceedings were instituted for the recovery of a sum of money, secured by mortgage, and come within the 8th section of the Real Property Limitation Act, 1874, and the period of limitation runs, as it did in the Act of 3 & 4 Wm. 4, c. 27, from the time at which a present right to receive "the same," that is to say, the sum of money secured by a mortgage, judgment or lien, or otherwise charged on, or payable out of any land, first accrued to some person capable of giving a discharge for, or a release for "the same." The Act of

(1) 9 H. L. C. 619, at p. 647.
(2) 6 Ir. Ch. R. 17, at p. 19.
(3) Unreported.
(4) 18 L. R. I. 170.
(5) 4 Ir. Eq. R. 502.

V.-C. 1900. JOHNSON v. LOWRY.

1850 abolished all statutory rights and powers of creditors by judgment previously existing, and substituted therefor the right to register judgments, subsequently obtained, as mortgages upon the lands of the judgment debtor. Consequently, money due upon a judgment entered since that Act did not become a charge on land, until registered as therein prescribed, and, therefore, it did not come within the sections of the Acts to which I have referred. It appears to me, therefore, to follow necessarily, that the period of limitation did not begin to run till it became such charge, as no present right to receive the same, that is to say, the money secured by a charge on land, could exist till such charge came into existence.

As for the case put forward by Mr. Brunskill, suppose in point of fact that, after this judgment was entered, a deed of mortgage had been executed by the judgment debtor to the judgment creditor, as a security, I do not think it could be contended that the Statute of Limitations commenced to run from the date of the judgment, and not from the date of the deed. It would not have been any more a charge on land than if it were a simple contract debt. The Judgment Mortgage Act, section 7, says, that where a judgment creditor registers his judgment as a judgment mortgage, this registration shall operate to transfer to the creditor, registering the affidavit, the lands of the debtor mentioned therein, for all the estate and interest of the debtor, and that such creditor shall have all such rights, powers, and remedies whatsoever, as if an effectual conveyance had been made to him at the date of registering the affidavit. I fail to see any legal ground of distinction between the two cases, and to hold that any such difference exists would be in opposition to express words of the Act. I am therefore of opinion that the Statute of Limitations commenced to run from the date of the registration of the affidavit, and not from the date of the judgment.

J. MAC M.

Appeal. 1900.

JOHNSON *v.* LOWRY.

Feb. 23.

The defendants appealed to the Court of Appeal (LORD ASHBOURNE, C., FITZ GIBBON, WALKER, and HOLMES, L.JJ.).

Ronan, Q.C., and *Brunskill*, for the appellants.

Matheson, Q.C., and *Herbert Wilson*, for the respondent.

LORD ASHBOURNE, C. :—

In the year 1884 a judgment was obtained by the plaintiff against the defendants for £107 18*s.*, debt and costs, and in the year 1889 this judgment was registered by the plaintiff as a mortgage against the defendants' interests in certain lands. No payment has been made and no acknowledgment has been given since the marking of the judgment in respect of the debt for which it was obtained. In the month of June, 1899, the plaintiff issued an originating summons in the Vice-Chancellor's Court, seeking to have the amount due upon the judgment mortgage declared well charged upon the lands, and, if necessary, raised by a sale. The defence relied upon was founded upon the Statute of Limitations, the defendants urging that the judgment debt was, under the circumstances, barred by sect. 8 of 37 & 38 Vict. c. 57; the plaintiff, on the other hand, contended that a new vitality was supplied to the debt by the registration of the judgment as a mortgage. The learned Vice-Chancellor yielded to the plaintiff's contention, and from his decision the present appeal has been taken.

It was decided in *Evans* v. *O'Donnell* (1) that execution cannot be issued on a judgment when for twelve years there has been neither payment made nor acknowledgment given on foot thereof. That was a decision in which I took myself a part, Fitz Gibbon and Barry, L.JJ., sitting with me. It was argued there that the 8th section of 37 & 38 Vict. c. 57, applied only to judgments charged upon land, and that judgments not so charged could be rendered effective at any time within twenty years. The Court pointed out the inconvenience that would necessarily arise from having varying periods of limitation applicable to judgments,

(1) 18 L. R. Ir. 170.

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according to the accident of the debtor having land to be charged, or the caprice of the creditor in making his charge effective against lands; and we held that all judgments were within sect. 8 of the Act of 1874. That decision of course binds this Court. But in that case the element introduced here by the judgment mortgage was wholly absent, and the question here is: Does the registration of the judgment as a mortgage make any difference?

The 7th section of the Judgment Mortgage Act made it possible to create a charge on lands, without the knowledge of the owner of those lands, and without requiring the performance of anything which could be regarded as a conscious act on his part. The judgment creditor, by the simple act of registering an affidavit, could transfer to himself property in which the debtor had previously a beneficial interest, subject, however, "to redemption upon payment of the money *owing upon the judgment.*" Thus when you had to ascertain what was secured by the judgment mortgage, you always had to come back to the judgment itself. The importance of this is that it shows that the judgment mortgage is made a substitute for the old writs of execution, such as *elegit*, and proceedings under Pigot's Act, which gave a hovering charge upon lands; that it was intended to supply a new and more precise mode of creating the judgment a charge upon the land—not to give a new debt, but to give a new subject-matter upon which, if the machinery of the Act was applied in a proper manner, the existing judgment debt would attach.

The decision in *Hone* v. *O'Flaherty* (1) also tends to show that the true view of the power given by the statute of registering a judgment as a mortgage is that it was a piece of machinery in the nature of execution for making the judgment effective. For it was there held that to enable a judgment creditor to register his judgment as a mortgage he must be in a position to issue execution on his judgment. It would seem to follow, therefore, that the only debt that can be recovered on a judgment mortgage is the debt that is recoverable on the judgment. Here the debt due upon the judgment is not recoverable, as it is admittedly statute-barred, unless the judgment mortgage gave it new vitality: and

(1) 9 Ir. Ch. Rep. 119, 497.

Appeal. 1900.

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Lord Ashbourne, C.

it is impossible to attribute this result to the registration, as it is only a proceeding in the nature of execution taken by the creditor, and not an acknowledgment or payment in respect of the judgment, or the creation of a new debt on the part of the debtor.

I am, for the reasons I have referred to, of opinion that the governing date for the purpose of applying the Statute of Limitations is to be found in the judgment itself, and that there is nothing to induce the Court to yield to the argument which prevailed with the learned Vice-Chancellor.

FITZ GIBBON, L. J.:—

The debt upon the judgment is barred, the judgment having been obtained in 1884. If the statutory mortgage created by the registration of the judgment had been a mortgage by deed, which either created or acknowledged a debt as of its date, the debt would not be barred, for that date would be 1889.

The question therefore is—What is the effect of the mortgage which is supposed to have been executed at the time of the registration? If the registration is only a process of charging upon particular lands whatever is at the time recoverable under the judgment, the question whether the debt is barred must be answered by referring to the date of the judgment. In my opinion the supposed mortgage creates a charge only for what is then due and recoverable under the judgment. It is subject to redemption "on payment of the money owing on the judgment." To prove his charge, the mortgagee must show that the amount claimed is owing on the judgment, and he can recover no more out of or against the lands.

Eyre v. *M'Dowell* (1) decided that the statutory mortgage charged only whatever estate or interest in the lands the debtor had both the legal and the equitable power to charge by deed. That case related to the subject-matter charged: it therefore does not decide this case, which relates to the amount of the charge. *Ex parte Collins* (2) was relied upon by the appellants as deciding that the statutory mortgage affected only such estate and interest in the lands as the debtor had power, either legally

(1) 9 H. L. Cas. 619. (2) 6 Ir. Ch. R. 17.

Appeal. 1900. JOHNSON v LOWRY. Fitz Gibbon, L.J.

or equitably, to charge: and *Eyre* v. *M'Dowell* (1) decided that this was so. *Hone* v. *O'Flaherty* (2) and *Evans* v. *O'Donnell* (3) decided the corresponding proposition with regard to the amount charged, namely, that the only debt which is recoverable under a statutory mortgage is the debt which is recoverable under the judgment which is registered. When the judgment is barred the statutory mortgage is gone, because the registration is only a mode of execution substituted for the writ of *elegit*, and for the procedure under Pigot's Act: and the hypothetical mortgage, which is only the creature of the statute, ceases to be enforceable when the judgment is barred. There is no longer anything to be secured, because there is no longer anything for which execution can issue.

WALKER, L.J.:—

If this case had arisen at an earlier period of the history of the law bearing on it, the result might have been different. Before the Judgment Mortgage Act was passed the judgment creditor had three remedies against the debtor's lands: two of these remedies were taken away by the Act, and one was left. "By way of substitute," as Lord Cranworth says in *Eyre* v. *M'Dowell* (1), for the remedies taken away the Act gave to the judgment creditor a new remedy for his debt. "Its object in the clauses in question appears to have been merely to get rid of the inconvenience so strongly felt in Ireland arising from the prevailing habit of taking securities by judgments which from their floating and undefined character materially impeded the transfer of land. The statute to prevent that evil compels the judgment creditor to specify the lands on which he means his debt to attach."

The foundation of the judgment mortgage is still the debt and the judgment: the registration of the judgment as a mortgage is a proceeding given in respect of the judgment: and the relation of mortgagor and mortgagee, no doubt, arises; but the relation of creditor and debtor still underlies it. It is not the creation of a debt; and the indebtedness must still be measured by the amount of money due under the judgment.

(1) 9 H. L. Cas. 619. (2) 9 Ir. Ch. Rep. 497. (3) 18 L. R. Ir. 170.

The registration of the judgment as a mortgage is in no sense an acknowledgment given in respect of the debt by the debtor within the meaning of the Statute of Limitations. Mr. Matheson contended that it was; but Mr. Wilson took a less sanguine view of this part of the respondent's case. An acknowledgment to take a debt affecting real estate out of the operation of the Statute of Limitations must be a document signed by the debtor or his agent. Look at the consequences if this were not so! The judgment—the foundation of the statutory mortgage—might be utterly gone in law, and still it could be revived without any act or conscious admission on the part of the debtor by the creditor simply swearing an affidavit and registering it in the office. Nay, a judgment creditor might be sagacious enough to find some trivial or worthless landed property, and then by registering his judgment as a mortgage against it might obtain a new claim against his debtor's personal estate.

Hone v. *O'Flaherty* (1), which decides that the judgment creditor must be in a position to issue execution on his judgment if he is to successfully register it as a mortgage, goes a long way in favour of the appellant, and our present decision does little more than press what was there decided to its logical conclusion.

HOLMES, L.J.:—

I concur, for reasons which can be stated very briefly. Where a judgment is registered as a mortgage, the debt is due upon the judgment, and the effect of registering it under the statute is only to supply machinery by which it can be enforced against a certain portion of the debtor's property. Once the judgment is satisfied, or if for any reason the debt cannot be recovered, the judgment mortgage ceases to operate. Here the judgment debt is barred by the Statute of Limitations, and the remedy under the mortgage is barred with it.

Solicitors for the plaintiff: *Norman & Law.*
Solicitor for the defendants: *Turpin.*

G. Y. D.

(1) 9 Ir. Ch. Rep. 497.

V.-C. 1900. May 2.

In re THE LIGONIEL SPINNING COMPANY; Ex parte THE BANK OF IRELAND.

(1898. No. 347.)

Company — Liquidation — Creditor — Proof of debt — Amount — Period of ascertainment.

Where a creditor proves for a debt against a company, which is being wound up under the Companies Act of 1862, the amount of the proof, on which dividends are to be paid, is to be ascertained when the claim is filed, and without regard to payments made by third parties after the sending in of the claim and before adjudication thereon.

Adjourned Summons.

The Ligoniel Spinning Company, which was ordered to be wound up on 22nd April, 1898, was indebted to the Bank of Ireland in the sum of £13,379 3*s.* 2*d.*, being the amount of certain sums advanced by the bank in respect of bills of exchange and promissory notes, and overdrawn account, and for interest. A claim in respect of this sum was furnished to the liquidator by the bank on the 15th April, 1899. The 1st May, 1899, was the day appointed by the liquidator for the adjudication upon the claim, but the matter was adjourned to the 30th October, 1899. No notice requiring the bank to verify their claim was served on them by the liquidator.

It appeared that the Cogry Flax Spinning Company, also in liquidation, was indebted to the Bank of Ireland in a considerable amount, due on foot of among others certain bills, which also bore the name of the Ligoniel Spinning Company. A considerable sum was paid on foot of those bills by the Cogry Company to the Bank of Ireland, after the claim was sent in by the latter, but before the adjudication thereon. The liquidator in this matter required by letter, that credit should be given in respect of these payments, which would have had the effect of reducing the amount of the proof to £10,870 6*s.* 2*d.* The bank, however, refused to

give credit for these payments, on the ground that when their claim was lodged, in pursuance of advertisements on behalf of the liquidator, their rights became fixed, and that they were not bound to reduce their proof by any moneys paid to them from third parties after lodgment of the claim, but that they were entitled to hold such moneys, so long as they should not have received 20*s.* in the £ on their debt.

When the matter came before the Chief Clerk, he acceded to the contention of the liquidator, and reduced the amount of the proof. The bank thereupon took out the present summons to have the ruling of the Chief Clerk reviewed.

Law, Q.C., and *Herbert Shaw*, for the bank :—

The time at which the amount, on which dividends are to be paid, should be ascertained, is the time at which the claim is sent in: therefore payments from third parties, subsequent to the sending in of the claim and prior to adjudication, cannot reduce the amount for which the bank are entitled to prove: *Kellock's Case* (1). No doubt that was a bankruptcy case, but the Judicature Act, sect. 28, sub-sect. 1, makes the practice prevailing in bankruptcy applicable to the administration of insolvent estates, and the winding-up of companies. [See also *In re Barned's Banking Company* (*Forwood's Claim*) (2); *Warrant Finance Company's Case* (3); *Ex parte Cama* (4); *Ex parte Schofield* (5); *Willams* v. *Hopkins* (6); *In re Scanlan* (7).]

Matheson, Q.C., and *T. H. Maxwell*, for the liquidator :—

A secured creditor is entitled to prove for the amount, due at the time when the claim is sent in, without regard to securities, which have been realised by him, between the sending in of his claim, and the adjudication thereon. The total amount for which this claim can be made is ascertained at that date, and the securities are then valued; but this does not affect the question of payments

(1) L. R. 3 Ch. App. 769.
(2) L. R. 5 Ch. App. 18.
(3) L. R. 5 Ch. App. 86.
(4) L. R. 9 Ch. App. 686.
(5) 12 Ch. D. 337.
(6) 18 Ch. D. 370
(7) 3 I. L. T. R. 663.

V.-C. 1900.

In re Ligoniel Spinning Co. *Ex parte* Bank of Ireland.

made in reduction of an unsecured balance by third parties also liable. The authorities cited on the other side were all cases of secured creditors, and were prior to the Judicature Act; but here the claim is on foot of an unsecured debt, and the proper time for ascertaining the amount of claim is when the claim is verified. In bankruptcy the claim is always verified. [They cited *In re Morris* (1).]

Herbert Shaw, in reply:—

The procedure, regulating the verification of claims in bankruptcy, differs from that relating to the administration of estates and winding-up of companies. In the administration and the winding up of companies the claimant need not verify his claim, unless required to do so by the liquidator: Order LXXIV., Rule 20; Order LV., Rule 49. The bank were in a position to verify their claim when it was sent in, and should not be prejudiced by delay on the part of the liquidator.

The Vice-Chancellor:—

In this case the question arises, as to which of two sums of money the Bank of Ireland are entitled to prove for in the liquidation. The sum of £10,870 6*s*. 2*d*. was the amount allowed by the Chief Clerk, but at the time the bank's claim against the Company was sent in the amount was £13,379 3*s*. 2*d*.

It is clear to my mind on the authorities, that the rule by which the Court is to be guided is that which is laid down in *Kellock's Case* (2). It was not a case differing from the present, though it was sought to make it distinguishable on the ground, that it was decided before the Judicature Act. I cannot see that that makes any difference. All the Judicature Act does is to apply to the Courts of Equity the rules, long prevailing in the Court of Bankruptcy, in reference to claims like the present. The Judicature Act applies these rules to cases of winding-up of companies, and the administration of estates which have proved to be insolvent. In all these cases the rule as to the valuation of securities is the same.

The question then comes, what is the time at which the amount

(1) [1899] 1 Ch. 485. (2) L. R. 3 Ch. App. 769.

of the proof is to be admitted, and the rights of the parties finally ascertained? The authorities cited to me show, that it is the date at which the claim is actually filed, whether or not the claim is accompanied by a verifying affidavit. In bankruptcy, no doubt, the claim is always verified, but the form of the claim and verifying affidavit really constitutes them one document. The practice, however, is different in the case of the winding-up of companies, as to a claim sent in to a liquidator, since the rules expressly provide that a claimant need not take any further step, unless he receives a notice from the liquidator. The rule was purposely framed to save expense, and therefore a creditor sending in a claim need not verify it, unless called upon to do so. It might possibly happen, that the liquidator might not immediately call for verification, and a delay might occur, and in the meantime a considerable sum of money might come in. This has happened in the present case, and the bank in the affidavit, which they afterwards put in, very properly mentioned the sums received by them from third parties, and stated that they were fully prepared to account for them. I am of opinion that the judgment in *Kellock's Case* (1) shows that the same reasoning applies to the adjudication on the claim as to the proof itself. If a party does not get a notice from the liquidator, he is not bound to come in and verify his claim at all, and therefore there might be no adjudication. How could the time be fixed, at which the rights of the parties are to be ascertained in that case, except it were a period contemporaneous with the sending in of the claim, whether it be in bankruptcy, the winding-up of companies, or the administration of insolvent estates.

I am therefore of opinion that the bank are entitled to prove for the full amount, the only limit being that of course they are not to get more than their debt.

I declare the bank entitled to their costs in this matter with their demand, and the liquidator to his costs in the winding-up.

Solicitor for the Bank of Ireland: *Malcomson.*

Solicitor for the liquidator: *White.*

J. MAC M.

(1) L. R. 3 Ch. App. 769.

Ross, J.
1900.

Jan. 22.
Feb. 16.

In the MATTER of the ESTATE of MICHAEL NUNAN, Owner; JOHN GEORGE M'CARTHY, Petitioner.

Board of Public Works — Loan for improvements — Two portions of land charged—Liability of one portion for the whole on the other portion being evicted—Lis pendens.

In 1876 proceedings for the sale of certain lands—A, B, and C—in the Landed Estates Court were registered as a *lis pendens*. Nothing was done under those proceedings after 1879. In 1880 the owner applied to the Board of Works for a loan on those lands under the Landed Property Improvement (Ireland) Act, 1847, which was duly made. In 1887 the landlord of B and C recovered possession of B and C in an ejectment for non-payment of rent. Another petition, for the sale of A, was subsequently filed:—

Held (1), that the whole of the Board of Works loan was charged on A, with its statutory priority; and (2) that the previous registration of the *lis pendens* did not affect the loan, as it derived its validity, not from the owner, but from the statute under which it was charged.

Application on behalf of the petitioner that the proceedings in this matter be consolidated with the proceedings in the matter of the estate of Michael Nunan, owner and petitioner; and that the receiver pay the interest on incumbrances in the priority set out in the schedule to the notice of motion, *i.e.* in the following order:—(1) The petitioner, (2) Mrs. Harris, and (3) the Commissioners of Public Works in Ireland.

The facts of the case are fully set out in the judgment.

H. D. Conner, Q.C., for the petitioner:—

It is wrong to charge different estates, held under different tenures, in one charging order: 10 Vict. c. 32, sects. 6, 11, 22, 23, 37, 38, 49. No information was given in the advertisement in the *Dublin Gazette* as to how much money was to be spent on each denomination of land.

Further, as at the date of the order for the Board of Works loan the absolute order for sale had been registered as a *lis pendens*, the Commissioners must be held to have dealt with

the lands subject to these proceedings: *Bellamy* v. *Sabine* (1); *In re Welch's Estate* (2).

J. F. Vesey Fitzgerald, for the Board of Works:—

The proper statutory notice was given by advertisement, and as the petitioner did not send in any objection, it is now too late to object to the order: 10 Vict. c. 32, sects. 11, 20, 21, 22, 23, 38, 47. The form of memorial in Schedule A was followed; and the lands mentioned in the memorial were charged. Further, there is no power of apportionment in the Commissioners or in the Land Judge. The Commissioners do not derive title from the memorialist, the owner here, but from the statute. The charging order is the act of the Board, and not the act of the parties, and therefore *Bellamy* v. *Sabine* (1) does not apply. The Public Works Loan Act, 1889, passed in consequence of the decision of the *Attorney-General* v. *Ireland* (3), is not retrospective, and the particular estate here determined before it came into force.

Conner, Q.C., in reply:—

Schedule A was prepared with a view to the simple case of one estate. The petitioner complains that, the Commissioners having lent money on worthless lands, these lands should be called on to repay it.

Feb. 16.

Ross, J.:—

The questions argued arise in settling a priority order.

The petitioner is the assignee of a mortgage, dated the 3rd September, 1863, to secure £5280. On the 30th January, 1880, an order for a loan to the owner was made, by the Commissioners of Public Works, of a sum of £1800. The Commissioners now claim their statutory priority, and seek to be placed above the petitioner's charge. It appears that the order not merely affects the lands ordered to be sold in this matter, namely, Ballyvinter Middle, but also other lands, Kilmacoon, and Ballybrack, which are not in the order for sale. In the year 1887, Kilmacoon and

(1) 1 De G. & J. 566. (2) 5 I. L. T. R. 140. (3) 15 L. R. Ir. 145

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In re NUNAN'S ESTATE.

Ballybrack were evicted for non-payment of rent. It is alleged that on the occasion of the eviction an agreement was entered into between the landlord, who recovered possession, and the owner in this matter, that they should mutually indemnify each other against the loan, and that it should be apportioned between them. As the law then stood the charge ceased to affect the lands when the tenant's interest had been extinguished by the ejectment. Only a portion of the money lent by the Board of Works was spent on the lands ordered to be sold in this matter. The Commissioners claim that they are entitled to throw the whole £1800 on these lands, their other security having disappeared.

It is in the first place contended by the petitioner that the Board of Works' incumbrance is bad, and not effectively charged in priority to his, on the ground that 10 Viet. c. 32 does not authorise one loan to be charged on lands held by an owner under different tenures. It becomes necessary to examine some of the sections in the statute. Section 6 enacts who are to be deemed the owners. The language used is very wide, and unless cut down by something else in the statute, would appear to include a person seised of or entitled to lands held under different tenures. By sect. 11 an owner may make an application for a loan by a memorial in a form annexed in a schedule to the Act. In it he must state the names and denominations of the lands to be charged, and the *estate* or *interest* which each applicant may have in the said lands and premises. Section 19 provides for the publication of the memorial in the *Gazette* and newspapers, requiring all persons concerned, if they object, to transmit a dissent or objection. I am sure that if the petitioner had lodged an objection in this case the Commissioners would have charged the lands separately. But no objection was transmitted, and on the registration of the order all parties interested in the land were bound as provided by section 22. By section 38 the rentcharge takes priority of all other charges. By section 66 the word "lands" includes all hereditaments, corporeal and incorporeal, and any interest or estate therein. From the language of all these sections I think it is clear that the Commissioners had jurisdiction to make the order, and that from the date of the registry of the order the several lands became charged with the rentcharge.

Ross, J.
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In re
NUNAN'S
ESTATE.

It is one entire rentcharge; it issues out of all the lands. There is no power in this Court to apportion it in any way; under section 62 of the Landed Estates Court Act, the conveyance of this Court does not affect such charges; there is a power to redeem and pay off, but there is no power to apportion.

I now come to the second point put forward by the petitioner. The absolute order was made on the 3rd June, 1897, but it appears that a former petition was presented by the owner in the year 1872, on which an absolute order was made in May, 1873. On the 29th May, 1876, it was registered as a *lis pendens*, being within five years of the registration of the Commissioners' order. This petition has been left derelict since 1879. I am now asked to consolidate it with the present proceedings. The case of *Bellamy* v. *Sabine* (1) very clearly illustrates the doctrine of *lis pendens*. The fact that the title of an alienee is affected by the proceedings in a pending suit is not founded on any principle of constructive notice. The true doctrine is, that it is necessary for the administration of justice, that the decision of a Court in a suit should be binding, not only on the litigant parties, but on those who derive title from them *pendente lite*, whether with notice of the suit, or without notice. "It would plainly be impossible," says Lord Justice Turner, "that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail."

I am of opinion that the Commissioners do not derive title from the owner at all. The owner, no doubt, puts the Commissioners in motion; but when they make their order, and it is registered, it takes effect by virtue of the paramount power of the statute. Assuming the Commissioners to have jurisdiction—as I have already decided they have—it is a judgment *in rem*.

For these reasons, I must order the Board of Works' charge to be placed at the top of the schedule.

Solicitor for the petitioner: *T. J. Barrington.*
Solicitor for the Board of Works: *Sir P. Coll.*

W. C. S.

(1) 1 De G. & J. 566.

M. R.
1899.
Dec. 11, 21.

In re DEANE'S TRUSTS; DUDLEY *v.* DEANE.

(1899. No. 1076.)

Marriage settlement—Wife's property—Ultimate trust for next-of-kin of wife —Words "die without having been married"—Infant child.

By a marriage settlement a sum of money to which the wife was entitled on the death of her mother was settled upon trust to pay the income to the husband for life, then to the wife for life, and after the death of the survivor in trust for the children and remoter issue as the husband and wife or the survivor should appoint, and in default of appointment to the children equally, if sons on attaining twenty-one years, or if daughters on attaining that age or marrying under that age. In default of issue attaining vested interests, the fund was to be held in trust for the wife absolutely if she survived her husband, but if she predeceased him, then upon such trusts as she should by will appoint, and in default of appointment, in trust for the person or persons who under the statutes for the distribution of the effects of intestates would on the decease of the said wife have been entitled thereto, if she had died possessed thereof intestate and without having been married. There were three children of the marriage, all of whom died under age and unmarried. No appointment was made by husband or wife. The wife predeceased her husband, leaving him and two of the three children surviving, and her only next-of-kin other than the children being her mother and two brothers. The husband survived his wife's mother and his two children, and married again. By his will he left all his property to his second wife, and appointed her executrix. On his death the fund became distributable:—

Held, that the fund went to the persons who would have been entitled thereto if the first wife had died a spinster, and not to her infant children.

Hardman v. *Maffett* (13 L. R. Ir. 499), followed; *Stoddart* v. *Saville* ([1894] 1 Ch. 480), distinguished.

Originating Summons.—

This was an application by the plaintiff, one of the trustees of the settlement executed on the occasion of the marriage of Hugh Deane and Anne Dillon, to determine who were the persons entitled to the sum of £1500 under the ultimate trusts of the wife's fortune. The facts of the case and the arguments of counsel are sufficiently stated in the judgment.

M'Carthy Mahony, for the plaintiff.

O'Connor, Q.C., for the defendant, Valentine Blake Dillon.

Herbert Wilson, for the defendant, Ellen Deane.

M. R. 1899.

In re DEANE'S TRUSTS.

THE MASTER OF THE ROLLS :—

Dec. 21.

This was an originating summons taken out by John Joseph Dudley, trustee of the settlement made on the marriage of Hugh Deane and Anne Dillon, dated the 22nd October, 1873, to determine who are the persons now entitled to the sum of £1500 under the ultimate trusts of the wife's fortune contained in the settlement.

The material facts are stated in Mr. Dudley's affidavit. By the settlement the sum of £1500, to which Anne Dillon was entitled on the death of her mother Monica Dillon, was settled upon trust to pay the income to her husband for life, then to the wife for life, and after the death of the survivor in trust for the children and remoter issue as the husband and wife or the survivor should appoint, and in default of appointment for the children equally, if sons, on attaining twenty-one, or, if daughters, on attaining that age or marrying under that age. In default of issue attaining vested interests, the property brought into settlement by the wife was to be held in trust for her absolutely, if she survived her husband; but if she predeceased him, then upon such trusts as she should by will appoint, and in default of appointment "in trust for the person or persons who under the statutes for the distribution of the effects of intestates would on the decease of the said Anne Dillon have been entitled thereto, if she had died possessed thereof intestate and without having been married." There were three children of the marriage, Edward, Thomas, and Jane; all died under age, unmarried. Thomas predeceased his mother. She died intestate in 1880, leaving as her only next-of-kin, other than the children, her mother Monica Dillon, and two brothers—John Blake Dillon, and the defendant Valentine Blake Dillon. No appointment was made by Hugh Deane or Anne Dillon, otherwise Deane.

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Jane Deane died in 1881. Monica Dillon died in 1888. Edward Deane died in 1893. By deed of the 4th October, 1883, John Blake Dillon assigned his share of the £1500 to the defendant Valentine Blake Dillon. By deed of the 23rd May, 1894, the plaintiff John Joseph Dudley, and the defendant Valentine Blake Dillon were appointed new trustees of the settlement of 1873.

Hugh Deane married again, and by his will bequeathed all his property to his wife the defendant Ellen Deane, and appointed her and the plaintiff executrix and executor. Hugh Deane died in 1899, and thereupon the fund became distributable.

The question is, what is meant by the "person or persons who under the statutes for the distribution of the effects of intestates would, on the decease of the said Anne Dillon, have been entitled thereto, if she had died possessed thereof intestate *and without having been married.*"

I had occasion to consider a somewhat similar question, more than fifteen years ago, in the case of *Hardman* v. *Maffett* (1). I shall not repeat what I then said, because I see no reason to depart from or modify that judgment, unless it has been shown to be wrong, or in effect overruled by subsequent decisions. It is obvious that in some cases, such as *Wilson* v. *Atkinson* (2), the context may show with something bordering upon demonstration that the words in question, or similar words, were never intended to exclude children. In that case an illegitimate daughter was directed "to be deemed to be a lawful child for the purpose of the preceding trust." But if, under the preceding trust, even a legitimate daughter would have taken nothing, the words quoted are meaningless. It is therefore obvious that in that case the very strong step of forcing the language as an alternative to nullifying the language, is justified. And I think it must be taken as settled that the words "without having been married" and the like occurring in a marriage settlement are *prima facie* intended to exclude the *jus mariti*, and are susceptible, when found in a suitable context—as in *Wilson* v. *Atkinson* (2), of being construed as meaning "not then being a married woman."

(1) 13 L. R. I. 499. (2) 4 De G. J. & S. 455.

It is said, however, that the words in question *must* be so construed, since in *Wilson* v. *Atkinson* (1) a general rule to that effect was laid down by the Court of Appeal. I need not re-agitate the controversy on this question, which I had to review in *Hardman* v. *Maffett* (2). Up to 1884 at any rate the matter was an open question as I thought; but my view was, and is, that neither Lord Justice Knight Bruce nor Lord Justice Turner laid down any such general rule as that when a woman is spoken of in a settlement as "if she had died without having been married" these words *must* mean—whatever the context—as if she were not actually married at the date of her death, though she may have been married before. And I venture respectfully to go further, and to say that it would not be within the province of any Court to legislate in that manner. Even the strictest terms of art have to yield to constructions necessitated by the context. In construing phrases like that before me (which is not a term of art) there is nothing to prevent the tribunal from looking at the whole instrument, and so arriving at the natural and rational meaning of it; recognising that the words plainly and distinctly refer, by themselves, to the case of a woman who has never been married at all, but may be explained by other words so as to bear a different, though a strained, meaning. And indeed this is, perhaps, stating the rule too narrowly, for there are cases in which the absence of a context may in the particular instrument lead to the same result. Thus, in *Stoddart* v. *Saville* (3), property of the wife was assigned to trustees upon trust to dispose of the same as the wife should in writing direct, and in default to pay the income to her for life for her separate use, and after her death for such persons as she should by deed or will appoint, and subject to any such appointment, "in trust for the person or persons who, under the statutes for the distribution of intestates estates, would on the decease of the said Georgiana Stoddart have been entitled thereto if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take in the shares in which the same would have been divisible between them under the same statutes."

(1) 4 De G. J. & S. 455. (2) 13 L. R. I. 499. (3) [1894] 1 Ch. 480.

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The wife never exercised her power of appointment, and died leaving an only son surviving her, and the question raised in the summons taken out by the trustees was whether the son could take under the ultimate trust as next-of-kin of his mother, or whether the words "without having been married" excluded a child by necessary implication. It will be observed that there was no provision in the settlement for children: they might take under the power of appointment, if it was exercised in their favour; otherwise not. Chitty, J., there says:—"The question as to the meaning of the words 'without having been married,' in an ultimate trust of this kind in a marriage settlement, has been before the Courts on several occasions, and the decisions are conflicting. On the one side are *Wilson* v. *Atkinson* (1), decided by Knight Bruce and Turner, L.JJ.; and *In re Ball's Trusts* (2), and *Upton* v. *Brown* (3), both decided by Sir Edward Fry; and *In re Arden's Settlement* (4), decided by Mr. Justice Stirling in November, 1890, which support the son's contention; and on the other side stands *Emmins* v. *Bradford* (5), decided by Sir G. Jessel, which is in favour of the nephews and nieces. In *Wilson* v. *Atkinson* (1) there was no doubt a context. The settlement contained no express provision for children or issue. The context was a declaration that, for the purpose of the ultimate trust, an illegitimate child of the wife should be deemed her lawful child. She left no lawful issue. Sir J. Romilly put a strict construction on the trust and declaration, holding that all issue were excluded, and that the effect of the declaration was, merely to place the illegitimate child in an excluded class (6). This decision, remarkable as it was for its strictness and perfect consistency, was reversed by the Court of Appeal. Both the Lords Justices, as I read their judgments, rested their decisions not merely on the declaration as special context, but also, as an independent ground, on the meaning which ought generally to be attributed to the words 'die without having been married' in an ultimate trust for next-of-kin in a marriage settlement. Turner, L.J., said that if it were necessary to construe the terms of the trust for the next-of-kin, independently, and without quali-

(1) 4 De G. J. & S. 455.
(2) 11 Ch. D. 270.
(3) 12 Ch. D. 872.
(4) [1890] W. N. 204.
(5) 13 Ch. D. 493.
(6) 33 Beav. 538.

fying them by the subsequent declaration, still, in his judgment, the trust for the next-of-kin ought not to be so construed as to exclude children, and that in either view the illegitimate child was entitled to the fund. In commenting upon this case Sir G. Jessel appears to have surmised that there was some other context besides that stated in the reports. But I find myself unable, in the face of the reports, to supply by conjecture any context except that which appears in the reports themselves. When Knight Bruce, L.J., speaks of the context forbidding the reading of the words as signifying 'without having been married to anyone,' and that he thought so independently of the declaration, I understand him to be using the term 'context' in the broad sense of a marriage settlement. Sir E. Fry in the two cases before him, both being cases on marriage settlements and without any other context, held the words insufficient to exclude the wife's issue, and following (as he stated in the second case) what he took to be the real principle of the Court of Appeal in *Wilson* v. *Atkinson* (1), interpreted the words as introduced merely to exclude any husband of the wife. Sir G. Jessel denied that there was any such principle, and he accordingly explained *Wilson* v. *Atkinson* (1), and declined to follow *In re Ball's Trusts* (2), and *Upton* v. *Brown* (3). Notwithstanding his explanation, I cannot help concurring with Sir E. Fry that the Court of Appeal did proceed on a general principle. The words do not in express terms exclude issue. The exclusion of issue, if issue are to be excluded, is founded on the legal inference which follows from not having been married, for, of course, a woman who has never been married can never in point of law have had or leave issue. But the Court of Appeal appears to have declined to treat this legal inference, which is not expressed in terms, as being sufficient to show that the father and mother intended by their marriage settlement to exclude the issue of the marriage or to prefer collateral relations to their own children, and, consequently, to have considered the words satisfied by confining them to the exclusion of any husband." Chitty, J., then refers to *Arden's Settlement* (4), and states that Stirling, J., informed him that the note of his judgment in that

(1) 4 De G. J. & S. 455.
(2) 11 Ch. D. 270.
(3) 13 Ch. D. 872.
(4) [1890] W. N. 20.

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case in the *Weekly Notes* was correct, and decided on the preponderance of authority that the son took.

One of the primary objects of a marriage settlement is to provide for the issue of the marriage. Such a settlement as that in *Stoddart* v. *Saville* (1) could not have been intended to exclude the children in default of appointment. It is right to use any lawful means to effectuate this unquestionable intention. There was no interest conferred upon the issue of the marriage as such. They could only take under an exercise of the power of appointment or under this ultimate limitation; and as *Wilson* v. *Atkinson* (2) had settled that the clause is susceptible of the wider construction, I am not surprised that Mr. Justice Chitty adopted it.

In *Arden's Settlement* (3) there was a provision for the children of the marriage. The lady to whom the property belonged was twice married; on her first marriage the property was settled on trust for her for life, then for her husband for life, and next for the issue of the marriage, and, subject thereto, "in trust for such person or persons as according to the statutes for the distribution of the estates of intestates would at the time of the failure of the issue of the said intended marriage, or at the time of the decease of the survivor of them"—the husband and wife—"shall last happen have been the next-of-kin" of the wife, "if she had died intestate and without having been married," to be divided between them if more than one. There was no issue of the marriage, and the husband predeceased the wife. She married again, and there were two children of the second marriage, a son and a daughter. The same property was again put in settlement as if it was her own, overlooking the existence of the first settlement, upon trust for the wife for life, and after her death upon trust for the children on attaining twenty-one or marriage. A sum representing portion of the trust funds was paid into Court after the second marriage, and an order made that the dividends should be paid to the wife till further order. Her second husband predeceased her, and she died several years afterwards, having made a will appointing her daughter and her husband her executor and executrix. On the daughter's marriage it was considered that she was entitled to a

(1) [1894] 1 Ch. 480. (2) 4 De G. J. & S. 455. (3) [1899] W. N. 204.

moiety of the funds, subject to her mother's life interest, and this moiety was put in settlement by the daughter. The son and daughter of the second marriage were the sole statutory next-of-kin of their mother at her death, and they claimed to be entitled under the settlement made on her first marriage to the trust funds thereby settled, and the daughter and her husband also claimed that one moiety was subject to the settlement under their marriage. The settlor at her death left no ancestor, brother, or sister her surviving, but eleven nephews and nieces, who were made respondents to the petition. They appeared by counsel, but waived their claims. *Wilson* v. *Atkinson* (1), *In re Ball's Trusts* (2), *Upton* v. *Brown* (3), and *Emmins* v. *Bradford* (4) were referred to. Stirling, J.'s judgment is briefly reported as follows:—"In the conflict of authorities it could not be said that the question was quite free from doubt; but looking at the judgments in *Wilson* v. *Atkinson* (1) and in *Upton* v. *Brown* (3), in which Mr. Justice Fry followed the decision in *Wilson* v. *Atkinson* (1), and went a little further, he should make a declaration that the children were not excluded from taking the funds." *Errington* v. *Semple* (5), which was the only other case cited by Mr. Wilson, is certainly a stronger case. There by a settlement made on the second marriage of a lady who had only one child by her first marriage, the trust fund was assigned to trustees, upon trust to pay the income thereof to the wife for life, then to her husband for life, and upon the death of the survivor upon trust to hold the fund for the children of the said intended marriage, and in default of children, and in the event of the husband being the survivor (which happened), in trust for such person or persons as the wife should by will or codicil appoint, and in default of such appointment, in trust for such person or persons as under the statutes for the distribution of the estates of intestates would at the time of the wife's decease have been entitled thereto if she had then died possessed thereof "a spinster and intestate." The settlement contained no reference to the child of the first marriage. The wife died without having had any child by her second marriage, and without having appointed

(1) 4 De G. J. & S. 455.
(2) 11 Ch. D. 270.
(3) 12 Ch. D. 872.
(4) 13 Ch. D. 493.
(5) [1899] W. N. p. 6.

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the fund, but leaving her child by her first marriage surviving. Romer, J., held, following *Stoddart* v. *Saville* (1), *In re Ball's Trusts* (2), *Upton* v. *Brown* (3), and *In re Arden's Settlement* (4), that the child of the first marriage was entitled as sole next-of-kin of her mother to the trust fund. That case goes a considerable length, but it is distinguishable. I do not profess to criticise these cases, or to argue that they were wrongly decided; I merely show they are distinguishable from the present case.

No case has said that the words "without having been married" must mean not actually married at the time, even when they occur in a marriage settlement. It depends on each case. They may or they may not have that meaning. In the conflict of judicial opinion, I am bound to give effect to what I think is the proper construction till my view is overruled.

Now in the present case there is an elaborate and careful provision for the children of the marriage, either under appointments or apart from them. The fortune of the mother is carefully and skilfully segregated from that of the father in the ultimate absence of appointment and of issue. If any child, or the offspring of any child, survived the surviving parent, it would have been provided for. The only event which is not expressly provided for (otherwise than by this clause) is that of the death under age and unmarried of all the children of the marriage after the death of the wife and in the lifetime of the husband. Why should that event be provided for? The very fact that the provision for children in default of appointment is expressly restricted to such as attain age or marry shows that there was no intention to provide for such as should not do so. Why should infant children so dying have any provision? Girls marrying under age would have their provision. Sons are not expected or desired to marry under twenty-one. There is no need, no duty, no conventional obligation to make any further provision whatever for infant children than this settlement contains. If infant children survived father and mother they took the whole. If they survived the mother alone and died infants in their father's lifetime, they took no part of her fortune under any direct gift. It is then to go "as if," &c.

(1) [1894] 1 Ch. 480.
(2) 11 Ch. D. 270.
(3) 12 Ch. D. 872.
(4) [1899] W. N. 204.

Now in this settlement, if I were to strain the language so clearly and deliberately employed, what would be the consequence?

Take it that these children dying infants were to have a distributive share as if their mother had died without having been married (meaning as if she *had* been married and as if her husband were dead). What then? A child dying under twenty-one and unmarried cannot under our law dispose of his property. He cannot make a settlement or a will. What happens then? Inevitably and by mere operation of law, the personal estate of that child goes to its father. The formality of administration has to be gone through; but that is a mere form, and no one else can administer. The law devolves it upon him. That is to say, under a clause designed, and it is said exclusively designed, to exclude the husband, the husband must by law, and without anything else, take the whole; for the only case in which the question here can arise is when the children die infants (as they did) and their father survives them.

I must, of course, yield my opinion on this or any other question to that of the Court of Appeal. But I think that the present case presents features not to be found in *Wilson* v. *Atkinson* (1) or any other decided case, unless it be *Hardman* v. *Maffett* (2); and, if I had to choose between them, the opinions of Lord Romilly and Sir George Jessel, I confess, appear to me the sounder. Even if the clause in question were to be read as if it comprised words such as "provided that nothing herein shall be construed to exclude any legitimate children of the said . . . from any right they otherwise would have had to a distributive share of the said sum of £1500," &c., surely, having regard to the context, words would have been added, such as "provided the said children shall attain age or if daughters marry under age."

I think the fund belongs to the next-of-kin of the wife, that is, to the defendant Valentine B. Dillon.

Solicitors for the plaintiff: *O'Connor & Dudley.*
Solicitor for the defendant V. B. Dillon: *V. B. Dillon in person.*
Solicitor for the defendant Ellen Deane: *P. A. Chance.*

W. L.

(1) 4 De G. J. & S. 455. (2) 13 L. R. Ir. 499.

V.-C.
1900.

JOHNS *v.* WILSON.

Jan. 25
March 8.

Will—Construction—General residuary gift of property "not hereinbefore disposed of"—Second residuary clause—Lapsed legacies and devises—Whether captured by first or second residuary clause.

A testator, after several legacies and devises of land, which failed, devised and bequeathed to his executors on certain trusts the remainder of his property, which he described as follows:—"All my railway and other shares, stocks, and interest in companies, moneys in the funds, dividends and debts due to me at the time of my death, and also the rest of my estate and effects, real and personal, *not hereinbefore disposed of*, and all securities, bonds, coupons, cash in bank or elsewhere." At the end of his will he appointed C. S. his residuary legatee:—

Held, that the words of the first general residuary clause were sufficiently wide to capture not only property undisposed of, but also lapsed legacies and devises, although there was apparently in that case nothing left for the second residuary clause to operate upon.

ADJOURNED SUMMONS.

In this case the testator by his will, bearing date the 11th of February, 1888, directed his executors to set apart out of his residuary estate such sum of money as would be sufficient to provide for two annuities of £50 each for Mrs. Jane Duncan Wilson, and Miss Catherine Jane Corneille. The sum so set apart was, on the determination of each annuity respectively, to revert to and form part of his residuary estate. He also gave and bequeathed to his cousin William D. D. Wilson absolutely all his estate and interest in the Commons of Carrickfergus, together with all stock, crops, chattels and animals thereon, and all machinery and implements thereon, or used therewith, and all rents which might be due thereout to him at the time of his decease; and also his freehold house and premises in Mary-street, Dublin, and his real and freehold estate in the town of Carrickfergus: all moneys secured by mortgage or judgment, or otherwise due to him and charged on the estate of the said William D. D. Wilson, and also a share of

his plate, furniture, &c. The will then contained the following clause:—"To my executors, whom I also make my trustees, I give, devise, and bequeath, all my railway and other shares, stocks, and interest in companies, moneys in the funds, dividends and debts due to me at the time of my death, and also the rest of my estate and effects, real and personal, *not hereinbefore disposed of*, and all securities, bonds, coupons, cash in bank or elsewhere upon trust, &c., . . . to pay the income thereof to my cousins William Davys Duncan Wilson, and Ellen Duncan Wilson, in equal shares for their respective lives, and after the death of either to pay the whole to the survivor for his or her life, and upon the decease of such survivor to pay over the trust funds and properties to all the children of the said William Davys Duncan Wilson, and the said Ellen Duncan Wilson, living at the death of the survivor of them in equal shares *per capita*, or if but one child of either, the whole to that child." The will then contained a proviso, that if there were no such child or children living at the death of the said William Davys Duncan Wilson, and Ellen Duncan Wilson, the executors were to hold the said trust funds, in trust for Mary Roberts and Arthur Roberts for their respective lives, with remainder to their children.

At the end of his will the testator appointed Charles Poyntz Stewart, or, in the event of his decease, his eldest son, to be his residuary devisee and legatee.

The testator died on the 5th May, 1899, and probate of his will was granted on the 21st July, 1899, to Mr. Henry Johns, one of the executors. Jane D. Wilson, Catherine J. Corneille, and William D. D. Wilson all predeceased the testator, and consequently their respective interests under the will failed.

The present summons was taken out by the above named executor, to take the opinion of the Court upon the question, whether the several legacies and devises above referred to, which lapsed, passed to the testator's executors in trust, under the general residuary gift to them, or to the subsequent residuary legatee and devisee.

Ronan, Q.C., and *G. Fitz Gibbon*, for the executor.

V.-C. 1900

JOHNS v. WILSON.

Law, Q.C., and *Lucas*, for C. P. Stewart :—

If there are two residuary gifts, one of which leaves nothing for the second residuary clause to dispose of, the latter clause operates. It is the duty of the Court to reconcile the two clauses, and to find, if possible, something for the second clause to pass unless a contrary intention is shown. If there were only one residuary clause, the words "not hereinbefore disposed of" would mean "not effectually disposed of," but *secus* where there is a second residuary clause. The fact that in the event of the death of the second residuary legatee in the testator's lifetime, there is a gift over to his son, shows that the testator did not intend all his property to be captured by the first residuary clause, but that he intended something to pass under the second. The present case is therefore distinguishable from *Fitzpatrick* v. *Knaresborough* (1), *Sherratt* v. *Bentley* (2), *Hardwicke* v. *Douglas* (3); but falls within *Davis* v. *Bennet* (4), *In re Jessop* (5), and *Hart* v. *Manston* (6).

Bates, Q.C., and *Robb*, for Miss Ellen Duncan Wilson :—

The lapsed dispositions form part of the general residuary estate which is bequeathed in wide and comprehensive terms to the executors, and the second residuary gift was intended merely to operate on the ultimate trusts of the will in the event of their possible failure. The testator was aware of the effect of the death of the residuary legatee in his lifetime, for he substitutes the legatee's son in that event; he must therefore be taken to have known that lapsed legacies would pass under the first residuary gift. A second residuary clause does not in itself revoke the first: *Kilvington* v. *Parker* (7); *Bristow* v. *Masefield* (8). In *Davis* v. *Bennett* (4), and *In re Jessop* (5), the only question was, whether the first residuary clause was revoked by the second, but that is not the question here.

(1) 13 Ir. Eq. R. 338.
(2) 2 M. & K. 199.
(3) 7 Cl. & Fin. 795.
(4) 30 Beav. 226.
(5) 11 Ir. Ch. R. 424.
(6) 34 W. R. 527.
(7) 21 W. R. 121.
(8) 31 W. R. 88.

[They also cited *De Trafford* v. *Tempest* (1), and *Champney* v. *Davy* (2).]

Serjeant Dodd, and *Brady*, for the minor children of Mr. and Mrs. Roberts, supported the contention put forward on behalf of Miss Wilson.

Lucas, in reply:—

Where there are two inconsistent gifts the last prevails; but if the two can be reconciled, both will be held good. In the case of two general residuary gifts, either of which is sufficient to capture everything undisposed of, lapsed legacies fall within the second gift when there is nothing else for it to work on. *Re Jessop* (3) decides this: see judgment, p. 427. To the same effect is *Hart* v. *Manston* (4), where it was held that as there was no lapse, there was nothing for the second general residuary gift to capture. *A fortiori*, if there had been a lapsed legacy it would have gone to the second residue. Unless the lapsed legacies go to the residuary legatee (Mr. Stewart) there is nothing to which the second residuary gift could possibly in any event apply.

De Trafford v. *Tempest* (1), and *Champney* v. *Davy* (2), and that class of cases do not touch the present question, as they are cases of dispositions of particular portions of a testator's estate; and a residuary gift applying to this particular portion alone captures any undisposed part of it in the absence of expression of contrary intention. *M'Kay* v. *M'Kay* (5) shows this clearly.

THE VICE-CHANCELLOR:— March 8.

The first question arises as to the sums directed by the testator to be set apart to provide for the payment of life annuities for

(1) 21 Beav. 564.
(2) 11 Ch. D. 949.
(3) 11 Ir. Ch. R. 424.
(4) 34 W. R. 527.
(5) [1900] 1 I. R. 213.

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Jane D. Wilson and Catherine J. Corneille. As they predeceased the testator, their annuities lapsed, and no sums were set apart for this purpose which never arose. The will must be treated as if it contained no such direction. I cannot see how the question came to be asked, as there was nothing to pass. The will was not a disposal of any existing thing either as an annuity, or a sum of money to provide for an annuity.

The second question is whether the testator's estate in the Commons of Carrickfergus with the stock, &c., and the rents due thereon, left by him to William D. D. Wilson, absolutely, which gift also lapsed, passed to the executors and trustees of the will under the devise and bequest to them of all the rest of the testator's estate and effects, real and personal, not thereinbefore disposed of; or whether they passed to C. P. Stewart as the residuary devisee and legatee.

The gifts marked in the summons, *b*, *c*, *d*, and *e*, which may be taken together as one entire gift, failed by lapse, William D. D. Wilson having died in the lifetime of the testator, and the subjects of them, so far as the specific gift of them went, became undisposed of. But so far as the residuary gifts affected them, either of them is wide enough to carry them, and they must have passed under one or other of them; and the real question is, under which of the two they passed.

The first of them is as follows: [His Lordship read this portion of the will, *ante*, p. 343]. There could be no doubt that but for the words "not hereinbefore disposed of," this would have passed the property which was the subject of the lapsed disposition. The whole question then is, was the property expressed to be left to William D. D. Wilson "thereinbefore disposed of." The words of this residuary gift are amply sufficient in themselves to carry it, and, in my opinion, they are clear and express apart from the effect of the words "not hereinbefore disposed of." It has been expressly decided by Romilly, M.R., in *De Trafford* v. *Tempest* (1), and may, I think, be taken to be the law that these words are not sufficient to cut down a general

(1) 21 Beav. 564.

residuary gift, and to exclude from its operation interests in property otherwise subject to the gift, which have failed to take effect by lapse or otherwise. The intention of the testator in inserting these words was, I think, to prevent any contradiction in terms, and to express that he intended to pass everything by the wide and sweeping gift that was not disposed of by him, that is effectually disposed of, in some other way. I am therefore of opinion that even upon the words of this gift alone, it carried not only what was not thereby disposed of in any way, but also what in the events that happened became undisposed of.

There is much in the context of the will to confirm this view, if it required such confirmation. The testator speaks in three different places of his "residuary estate," first, when he directs funds to be set apart out of his residuary estate for payment of the annuities given by the will; secondly, when he directs each annuity fund on the death of the annuitant to revert to and form a part of his residuary estate; thirdly, when he directs the duty on one of his legacies to be paid out of his residuary estate. In another place he directs a portion of his real estate to form part of his "residuary gift," meaning the same thing. These all precede the wide gift to his trustees where we find the words "all the rest of my estate and effects real and personal." This is followed by the important clause "upon further trust" to pay thereout my debts and funeral expenses though these were of course the first charge on all his assets without any direction from him, and which he takes pains to mention *ex abundante cautelâ*, because he was disposing of all.

This view does not render the appointment of C. P. Stewart his residuary devisee and legatee incapable of becoming operative, for it was not possible to foresee that some occasion might not arise to leave something undisposed of by lapse or otherwise.

However, all these subordinate considerations seem to me not to be of any operative importance, as I hold that the words of the general gift alone are sufficient to capture all these lapsed gifts.

I accordingly hold that all these lapsed gifts passed by the

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residuary gift to the executors and trustees upon the trusts in the will declared.

The costs must come out of the general residuary estate, and be paid by the executors and trustees thereout.

Solicitor for the executors: *Middleton.*
Solicitors for the minors: *Webb, Scott, & Seymour.*
Solicitors for the other parties: *Johns, Bates, & Johns.*

J. MAC M.

IN RE HILL.

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(1899. No. 922.)

Nov. 13. Dec. 12. 1900. Jan. 18. Feb. 12, 27.

Pauper lunatic—Maintenance—Scotch curator bonis—*Payment out to.*

Money to which a pauper lunatic, maintained by a Scotch parish council, became entitled on an intestacy was paid into Court under the Trustee Act, 1893. An inspector of poor, appointed by the Sheriff Court *curator bonis* to the lunatic, applied for payment out of the entire fund with the object of applying portion of same in discharge of the past maintenance of the lunatic, and of retaining the residue towards his future maintenance:—

Held, that the *curator bonis* had not an absolute right to payment; that the Court had a discretion as to paying out the fund, and was bound to exercise that discretion in the interest of the lunatic.

Order made for payment of portion of the capital in respect of past maintenance, and for quarterly payments out of income and capital during the life of the lunatic.

SUMMONS.

In May, 1899, Harriette Hill, as administratrix of George Wilson Hill, who had died intestate, paid into Court under the provisions of the Trustee Act, 1893 (56 & 57 Vict. c. 53), the sum of £281, representing the distributive share of the assets of the said G. W. Hill, to which Andrew Hill as one of his next-of-kin was entitled, the said Andrew Hill being of unsound mind and an inmate of an asylum at Paisley in Scotland.

This was an application by Andrew Wallace as *curator bonis* to the said Andrew Hill, appointed by order of the Sheriff Court of Lanarkshire, for payment out to him of the said funds.

An affidavit of the applicant stated, amongst other matters:—Andrew Hill was then, and had been for five and a-half years, a pauper lunatic in the Crichton Institution and Hawkshead Asylum, Paisley, belonging to the Parish Council of Govan Combination, and had been and was still being maintained out of the rates administered by the said parish council, and there was due to the said council the sum of £157 2*s.* 6*d.* in respect of such maintenance;

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by order of the sheriff of Lanarkshire dated the 21st August, 1899, and made in pursuance of the powers vested in him by the Judicial Factors (Scotland) Act, 1880 (43 & 44 Vict. c. 4), the deponent was appointed *curator bonis* of the said Andrew Hill; as such *curator bonis* the deponent was in the same position as a receiver or committee of the estate of a lunatic appointed by an English or Irish Court, and was entitled to be paid, and to administer all the estate and personal property of the said Andrew Hill, wherever situate, and was bound to account for same to the Court by which he was appointed.

There was also an affidavit by Jane Hill, the wife of Andrew Hill, in which she stated that as the parish council had made considerable advances for the maintenance of her husband, it became necessary to have a *curator bonis* appointed to receive any property belonging to him and to expend it for his benefit: accordingly she had presented a petition to the Sheriff Court of Lanarkshire to have such curator appointed, and by order of said Court, Andrew Wallace, Inspector of Poor, was appointed, and he was the person entitled to the money lodged in Court.

Andrew Todd, in support of the application.

W. H. Brown, for Harriette Hill.

The following were referred to:—As to the appointment, &c. of a *curator bonis* and his rights as to property, 12 & 13 Vict. c. 51, especially sects. 1-6; the Judicial Factors (Scotland) Act, 1880 (43 & 44 Vict. c. 4); *In re Garnier* (1); *In re Morgan* (2); *In re Stark* (3); *Scott* v. *Bentley* (4); *Hessing* v. *Sutherland* (5); *Newton* v. *Manning* (6); *In re Elias* (7). As to the cost of the maintenance of pauper lunatics in Scotland and the application of their property to payment of same, 20 & 21 Vict. c. 71, especially sects. 73-79, 81-84, 95, 112; the Lunacy (Scotland) Act, 1866 (29 & 30 Vict. c. 51), sect. 17. As to payment out of Court for maintenance

(1) L. R. 13 Eq. 532.
(2) 1 Hall & Tw. 212.
(3) 2 Mac. & G. 174.
(4) 1 K. & J. 281.
(5) 25 L. J. (N. S.) Ch. 687.
(6) 1 Mac. & G. 362.
(7) 3 Mac. & G. 234.

of pauper lunatics, *Re Parker* (1); *In re Upfull's Trust* (2); *Re Ward's Estate* (3); also *In re Berry* (4).

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The Vice-Chancellor required further evidence on certain matters, and accordingly an affidavit was made by William R. Watson, the Medical Superintendent of the Hawkshead Asylum, which stated:—The charge for the maintenance of each inmate in the institution from the 30th March, 1894, when Andrew Hill was admitted, to the 15th May, 1899, was 10*s.* per week, as fixed by the District Lunacy Board, which included the parish of Govan, and since the latter date the charge had been 11*s.* per week; the said sum of 10*s.* each week was the average cost of maintenance of each inmate during the said period from the 30th March, 1894, to the 15th May, 1899, and a rate on that basis was assessed each year, and since the 15th May, 1899, the average cost per week had been 11*s.*; the average cost of clothing per year for each inmate since the 30th March, 1894, had been about £2 12*s.*; the said average cost for maintenance and clothing did not include anything for establishment charges, such as rents, &c., but included proportion of salaries and wages; the amount expended by the Govan Parish Council for the maintenance and clothing of Andrew Hill, at the rate aforesaid, was £163 12*s.* 10*d.* up to the 22nd December, 1899.

THE VICE-CHANCELLOR:—

1900. Feb. 12.

This was an application by a person who has been duly appointed by a Scotch Court of competent jurisdiction *curator bonis* of a lunatic named Andrew Hill, for payment out to him as such curator of a sum of money, being the distributive share of Andrew Hill of the assets of George W. Hill, which was brought into this Court under the Trustee Act, 1893. It appears that Andrew Hill has been for some years an inmate of a District Lunatic Asylum in Scotland as a pauper lunatic, and supported there as such. The expense of such maintenance being payable by the parish out of the rates, an arrangement exists by which the charge

(1) 2 W. R. 139.
(2) 3 Mac. & G. 281.
(3) 2 W. R. 406.
(4) 13 Beav. 455.

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In re HILL.

to be paid by the parish to the District Asylum is 10*s.* a week for each patient. By the 77th section of the Lunatics (Scotland) Act, 1857, it is enacted that the expenses incurred in relation to the maintenance of any lunatic shall be defrayed out of the estate of such lunatic; and if he has no adequate estate that he shall be treated as a pauper lunatic, and such expense shall be defrayed by the parish; and that the party disbursing such expenses shall be entitled to recover the same from or out of the parties or estate liable to defray the same as aforesaid. In the present case the lunatic was maintained for several years in the District Asylum as he had no estate, but when he came in for the money now in Court, and the asylum or the parish authorities became aware of it, they claimed to have it applied to payment not only of the accruing gales but also of all the arrears of maintenance. Instead of instituting proceedings in the proper Court in Scotland to have their rights ascertained and declared, they obtained the appointment of one of their subordinate officers as *curator bonis* of the lunatic, and he now applies for payment out to him of the entire fund, admittedly for the purpose of applying it to payment of the entire sum claimed for maintenance and holding the surplus, if any, for the payment of future maintenance. He claims to be entitled to this fund as a matter of right, just as an executor or administrator would, on the production of probate or letters of administration, be to personal estate of his testator or intestate. Having regard to the case of *In re Garnier* (1), before Sir R. Malins, and the authorities there referred to by him, I cannot admit that a *curator bonis* has any such absolute right; and I hold that the Court has a discretion as to paying out the fund, and is bound to exercise that discretion in the interest of the lunatic to whom it belongs. I do not say that the parochial or district authorities have not a right to be paid thereout whatever they are justly entitled to claim, but here no such claim has been established in any judicial proceeding in Scotland, nor has it been put forward before me, for the claim here is to pay the whole fund to the *curator bonis*, constituting him the authority to allow or disallow in whole or in part the claim of the parish or district authorities whose servant

(1) L. R. 13 Eq. 532.

he is. It seems, too, to be a hard thing now to go back on the years during which this man has been treated as a pauper lunatic and to charge him now, retrospectively, as a paying patient, because he has happened to come in for this small sum, which would thus be altogether, or to a large extent, appropriated to the past, leaving at best a very small and inadequate sum available for the future years of his life. If any reasonable arrangement were arrived at limiting the claim to the time the lunatic came in for the money or some other recent period, and reducing the annual amount and providing for the payment of his future maintenance at such reduced amount as long as the fund lasts, I should be ready to consider it.

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Until some reasonable arrangement is come to I must decline to pay the fund.

Feb. 27.

Ultimately on the 27th February the Vice-Chancellor made an order for payment of the costs of the application, and payment to the applicant, as *curator bonis* of Andrew Hill, of £100 for the past maintenance of the said Andrew Hill, and of quarterly payments of £5 5*s*. during his life or until further order.

Solicitor for the applicant: *William Lynch.*
Solicitor for Harriette Hill: *Fitzhenry.*

D. M'C. M.

V.-C.
1899.

Dec. 15.
1900.
Jan. 17.
Feb. 14.
March 8.

TREDENNICK *v.* TREDENNICK.

(1899. No. 961.)

Power—Execution—Excessive appointment—Appointment to object for life, with power to appoint by will—Perpetuity—Appointment to A of dividends on securities from January to July, and to B of dividends from July to December—Corpus.

By a marriage settlement certain funds were vested in trustees, upon trust, after the deaths of the husband and wife, for the children of the marriage, or the issue of such children, who might die leaving issue, as the husband should by deed or will appoint, and in default of such appointment for such children equally. The wife having died, the husband by will appointed that the trustees of the settlement should stand possessed of the trust funds, as to £2000 part thereof for his daughter M., upon the same trusts as were thereinafter declared in respect of her share of his personal estate. He bequeathed his general personal estate to trustees upon trust to realize and pay debts, &c., and bequeathed £2000 to M., and directed his trustees to retain the said sum, and also the £2000 thereinbefore appointed to her, with power to invest same for her benefit, and to pay the annual proceeds thereof to her for life on her separate receipt, without power of anticipation, and after her decease to pay the principal as she should by will appoint, and in default of appointment to pay same to her next-of-kin, with power to his trustees to hand over the principal to the trustees of any settlement which might be executed in the event of her marriage. He made a codicil, and thereby appointed to his said daughter an additional £800, revoked her legacy of £2000 and in lieu thereof bequeathed to her £1200, and directed that the sums to which she should become entitled under the will and codicil, whether by appointment or bequest, should be held by the trustees of his will upon the like trusts for the benefit of his said daughter as were in his will declared concerning the sums by it appointed and bequeathed to her:—

Held, following *Wollaston* v. *King* (L. R. 8 Eq. 165), that the appointments of the £2000 and £800 were inoperative beyond the life interest appointed to M., and that on her death these sums passed under the settlement as unappointed.

M. made her will, and thereby bequeathed to C. all the dividends paid into bank to her account from January to July (specifying certain securities), and to L. the corresponding dividends payable from July to

December. It was shown by evidence that the securities mentioned represented the £1200 legacy in her father's will:—

Held, that the capital was appointed equally between C. and L.

ORIGINATING SUMMONS.

By settlement dated the 4th June, 1827, and made on the marriage of George Nesbitt Tredennick and Lydia Magee, certain money funds and securities were vested in trustees upon trust for the said G. N. Tredennick for life, then for the said Lydia Magee for life, and after the decease of the survivor of them, and in case there should be two or more children of the marriage, upon trust to pay and transfer the said trust funds unto, between, and amongst such two or more children or the issue of such children who might happen to die leaving issue, or to any or either of such children, &c., at such ages, &c., in such shares, &c., and subject to such conditions and limitations as the said G. N. Tredennick by deed, &c., or by will or codicil, &c., should appoint; and in default of such appointment as the said Lydia Magee in case she survived her husband by deed or will, &c., should appoint, and in default of such appointment then upon trust to pay and transfer the said trust funds between and amongst such two or more children equally to be divided amongst them share and share alike as tenants in common, and their respective executors, administrators, and assigns, the shares of sons to be vested at twenty-one, and, of daughters, to be vested at that age, or marriage: provided that if any such child or children being a son or sons should die before attaining the age of twenty-one years without lawful issue at the time of his death or born in due time afterwards, or, being a daughter or daughters should die before the age of twenty-one years without having been married, the share or shares of every such child or children so dying as aforesaid should in default of such appointment go to the survivors or survivor, or others, or other of them, with like provisions as before.

There were several children of the marriage, of whom Margaret Sarah Tredennick was one.

Lydia Tredennick died in 1866.

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G. N. Tredennick made his will dated the 2nd February, 1878, and thereby, after reciting that under his settlement he was authorised to appoint the trust funds the subject thereof, and amounting to £9384 12*s.* 3*d.*, between and amongst his children or their issue in manner in the settlement provided, that the trust funds consisted of £7384 12*s.* 3*d.* secured by mortgage, £1000 secured by judgment, and £1000 by a policy on his own life, and that he had then living seven children, and that he had by her marriage settlement appointed to Anne Logan, one of his daughters, the judgment moneys and £200 part of the policy moneys, and had by her marriage settlement appointed and paid the sum of £2000 to or for the benefit of another daughter Lydia Colhoun, and had by her marriage settlement appointed and paid the sum of £1000 to or for the benefit of another daughter Elizabeth Coffey; and that by virtue of the payments by him as aforesaid out of his own proper moneys of said sums of £2000 and £1000, he was then beneficially entitled to £3000 portion of the said £7384 12*s.* 3*d.* so secured by mortgage; and that he was desirous of further exercising the power of appointment reserved to him by the said settlement in manner after mentioned; he in pursuance and further exercise of such power and of every other power, &c., appointed that the trustees of his settlement should stand possessed of the unappointed residue of the said trust funds upon the trusts after set forth, viz. as to £800 residue of the said policy for his daughter Anne upon the same trusts as were declared in respect of the sum of £1200 appointed to her by her settlement, and as to £1000 other part of the said trust moneys for his daughter Elizabeth upon the same trusts as were declared respecting the sum of £1000 settled upon her marriage, and as to £2000 other part of said trust moneys for his daughter Margaret Sarah Tredennick upon the same trusts as were by his will after declared in respect of her share of the testator's residuary personal estate; and after a further appointment of £1 he appointed and bequeathed the residue of the trust fund to Lillie Tredennick, child of his late son George, with a gift over in favour of Margaret Sarah Tredennick. He bequeathed his general personal estate to trustees upon trust to realize and pay debts, &c., and bequeathed to Margaret Sarah Tredennick £2000; and he directed his trustees

to retain the same, and also the sum of £2000 before in his will appointed to her, with power to his trustees to invest the same respectively for her benefit on such securities as she should approve of, and to pay the annual proceeds thereof on her own sole and separate receipt for her life, and so that she should not have power to anticipate the same, and after her decease to pay the principal money as she should by will appoint, and in default of appointment to pay the same unto her next-of-kin, with power nevertheless to the executors and trustees of his will to hand over the said principal sums to the trustees of any settlement which might be executed in the event of her marriage.

The testator made a codicil, dated the 17th January, 1880, to his said will, and thereby after revoking the appointment to his daughter Anne of £800 residue of the policy of insurance in the will mentioned, and making certain bequests in lieu thereof out of his own property, he, in further exercise of the powers reserved to him by his settlement, appointed to his daughter Margaret Sarah Tredennick out of the trust funds, the subject of said settlement, and in addition to the sum of £2000 by his will appointed to her, the further sum of £800, being the residue of the moneys secured by the said policy, and he also appointed to her such further sum as might be payable on foot of said policy in respect of bonuses; he revoked the legacy of £2000 by his will bequeathed to his said daughter out of his personal estate, and in lieu thereof he bequeathed to her thereout the sum of £1200; he directed that the sums to which his said daughter should become entitled under his will and that codicil, whether by appointment or bequest, should be held by the trustees of his will upon the like trusts for the benefit of his said daughter as were in his will declared concerning the sums by it appointed and bequeathed to her.

The testator died in 1880, and his will and codicil were proved.

Margaret Sarah Tredennick made her will, dated the 5th December, 1896, as follows:—I bequeath to my sister E. M. Taylor Coffey, and Emily Taylor Coffey, all the dividends paid into the Bank of Ireland to my account due from January to July, including the London and Westminster Bank, Eastern Telegraph 41 preference shares, London and North Western £1400,

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Consolidated Metropolitan £500, and £250 Surplus Lands, 20 shares London and Westminster Bank, 18 preference shares J. and P. Coats, and to my nieces Maud M. Logan, Marian Logan, and Lydia Margaret Logan, the corresponding dividends of afore-mentioned securities payable from July to December, including London and Westminster Bank.

The testatrix died on the 24th January, 1899, and letters of administration with the will annexed were granted to James R. K. Tredennick.

James R. K. Tredennick took out this summons for the determination of the following questions arising in the administration of the estate of Margaret Sarah Tredennick :—1. Whether the appointments upon trust for Margaret Sarah Tredennick of the sums of £2000 and £800 respectively, made by the will and codicil of George Nesbitt Tredennick were wholly or in part valid exercises of the power of appointment vested in the said G. N. Tredennick by the settlement ; and if the said appointments were partially invalid, to what extent were they invalid ?

2. If the Court should be of opinion that the said appointments were valid exercises of the power, whether by her will Margart Sarah Tredennick wholly or in part validly exercised the power of appointment given to her by the will of G. N. Tredennick, as regards the portions of the trust funds subject to the trusts of the settlement appointed upon trust for her as aforesaid ?

3. Whether by her will Margaret Sarah Tredennick validly exercised the power of appointment given to her by the will of G. N. Tredennick as regards the sum of £1200 bequeathed by him in the codicil out of his personal estate upon the trusts declared in his will for the benefit of Margaret Sarah Tredennick ?

4. If the Court should be of opinion that Margaret Sarah Tredennick did not by her will validly exercise the power of appointment given to her by the will of G. N. Tredennick, were her next-of-kin entitled to the said sums of £2000 and £800 ?

D. F. Browne, for the plaintiff.

William Jellett, Q.C., for certain trustees of the fortune of Margaret Sarah Tredennick provided for her by the will of G. N. Tredennick.

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Herbert Wilson, for L. M. Colhoun, representing the class to take in default of appointment under the settlement. He contended that the provisions in the will and codicil of G. N. Tredennick with respect to the £2000 and £800 after the life interest therein appointed to Margaret Sarah Tredennick were void, and that these sums passed under the deed as in default of appointment.

He cited *Hutchinson* v. *Tottenham* (1); *Wollaston* v. *King* (2), referred to by Stirling, J., in *Peacock* v. *Frigout* (3); 1 Jarm. Wills. (5th ed.), 261; *Morgan* v. *Gronow* (4); *Stuart* v. *Babington* (5).

Pigot, for Maud M. Logan, representing beneficiaries under the will of Margaret Sarah Tredennick, contended that she took absolutely under her father's will and codicil. He referred to *Fry* v. *Capper* (6); *In re Teague's Settlement* (7); *Woolridge* v. *Woolridge* (8); *Freme* v. *Clement* (9); *Hales* v. *Margerum* (10); *Page* v. *Soper* (11); *Turner* v. *King* (12).

Pim, for Douglas S. A. Logan, representing the class of next-of-kin of Margaret Sarah Tredennick. He referred to *Bray* v. *Bree* (13); *Page* v. *Soper* (11), followed in *In re Onslow* (14); *Turner* v. *King* (12).

1900. Jan. 17.

THE VICE-CHANCELLOR:—

The first question submitted in this case for my decision is whether the sums of £2000 and £800, portions of the trust funds comprised in the settlement on the marriage of the Rev. G. N. Tredennick with Miss Lydia Magee, dated the 4th June, 1827, were effectually appointed by his will and codicil.

By that settlement certain trust funds were vested in trustees in trust to pay the income thereof to the husband and wife for their respective lives, and after the death of the survivor, in case

(1) [1898] 1 I. R. 403; [1899] 1 I. R. 344.
(2) L. R. 8 Eq. 165.
(3) [1893] 1 Ch. 54.
(4) L. R. 16 Eq. 1.
(5) 27 L. R. I. 551.
(6) Kay, 163.
(7) L. R. 10 Eq. 564.
(8) John. 63.
(9) 18 Ch. D. 499.
(10) 3 Ves. 299.
(11) 11 Ha. 321.
(12) [1895] 1 Ch. 361.
(13) 2 Cl. & F. 453.
(14) 39 Ch. D. 622.

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there should be two or more children of the marriage, in trust to pay and transfer the trust funds unto and between such children, or the issue of such children, who might happen to die leaving issue, as the husband should by deed or will appoint, and in default of such appointment as the wife surviving should in like manner appoint, and in default of such appointment, then upon trust to pay and transfer the same unto and between such two or more children equally, their respective executors and administrators. Provided that if any of such children being a son should die before twenty-one without leaving issue, or being a daughter before twenty-one without having been married, the share of any such child so dying should in default of such appointment go to the survivors or others of them in equal shares.

There were seven children of the marriage.

The Rev. G. N. Tredennick made his will, dated the 2nd February, 1878, reciting the said power, and that he had appointed to Mrs. Logan, one of said children, the sum of £1000, part of said trust funds, and also the sum of £200, portion of a sum of £1000, also a part of said trust funds, secured by a policy of assurance on his own life; and had also appointed to Mrs. Colhoun, another of said children, the sum of £2000, which he had advanced out of his own moneys; and also the sum of £1000 to Mrs. Coffey, another of said children, which he had also advanced out of his own moneys, and proceeded in express exercise of his said power to appoint thereby to Mrs. Logan the further sum of £800, being the residue of the said sum secured by said policy; and to appoint the sum of £2000, other part of said trust moneys to be held by his trustees for his daughter Margaret Sarah Tredennick, upon the same trusts nevertheless as were thereinafter declared in respect of her share of his residuary personal estate; and he appointed the residue of the trust funds to his granddaughter Lillie Tredennick, daughter of his deceased son George. He then proceeded to dispose of his own residuary personal estate, out of which he left a sum of £2000 to his said daughter Margaret Sarah, and directed his trustees to retain the same, and also the sum of £2000 thereinbefore appointed to her, with power to invest the same respectively for her benefit, on such securities as she should approve of, and to

pay the annual proceeds thereof on her own sole and separate receipt for her life, and so that she should not have power to anticipate the same, and after her decease to pay the principal money as she should *by will* appoint, and in default of appointment to pay the same to her next-of-kin, with power to the executors and trustees of his will to hand over the said principal sums to the trustees of any settlement which might be executed in the event of her marriage.

The testator made a codicil to his will, dated the 17th January, 1880, by which he revoked the appointment by his will to Mrs. Logan of the £800 residue of the policy moneys, and in lieu thereof bequeathed to her other sums out of his residuary personal estate, and in further exercise of the power of appointment in his marriage settlement, he appointed to his said daughter Margaret Sarah out of the trust funds the subject of the settlement, in addition to the sum of £2000 by his will appointed to her, the further sum of £800, being the residue of the money secured by the policy of assurance, and all sums payable by way of bonus on said policy. He then revoked the legacy of £2000 by his will bequeathed to said Margaret Sarah out of his personal estate, and in lieu thereof he bequeathed to her thereout the sum of £1200, and he directed that the sums to which she should become entitled under his will and codicil, whether by appointment or bequest, should be held by the trustees of his will upon the like trusts for the benefit of his said daughter Margaret Sarah as are in his will declared concerning the sums by said will appointed and bequeathed to her.

Therefore, reading this appointment as it stood after all these changes, it comes to this that the testator appointed to Margaret Sarah £2000 out of the general trust funds of the settlement, and also the entire sum of £1000 secured by the said policy, together with all bonuses which should be payable in respect thereof, and directed that the same should be held in trust by the trustees of his will to invest and pay the annual proceeds to her for her separate use for life, without power of anticipation, and after her death to pay the principal as she should by will appoint, and in default to pay the same to her next-of-kin. The question of remoteness is entirely separate from all questions of the

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construction of the instrument under consideration, which must be dealt with according to the ordinary rules of construction, and when its true meaning has thus been arrived at, the rule of law against perpetuities is to be applied. Here there is not any difficult or doubtful question of construction, for the testator has plainly expressed what he desired to have done with these moneys, namely, that they should be placed in trust for his daughter Margaret for life for her separate use without power of anticipation, and that on and from her death they should be held in trust for such persons as she should *by will* appoint, and in default of appointment in trust for those persons who should at her death be her next-of-kin. To this set of trusts must be applied the measure of the rule as to perpetuities, and it must be ascertained whether these trusts are confined within the limits prescribed by the rule. The trusts are created by a deed of settlement, not by a will, and the time for ascertaining the persons in being for the purpose of applying the rule against perpetuities is the date of the execution of the settlement. The children of the then intended marriage are not persons in being within the rule, and the period of twenty-one years, and the further period of gestation, if it exists, must be computed from the death of the survivor of the husband and wife, and not from the deaths of the children of the marriage. Then the will of George Tredennick, on which this question arises, must be read into the marriage settlement as being an execution of the power thereby given to him. The trusts thus expressed would be for George Tredennick and his wife for their respective lives, and then, so far as regards the portion with which alone I have to deal, namely, that of Margaret Sarah, in trust for her, for her life for her separate use, without power of anticipation, and after her death for such persons as she should *by will* appoint, and in default of such appointment, for her next-of-kin. Margaret took a life interest only in her portion. She was not given a general power of disposing of it, for she is only enabled to do so by will. This *expressio unius est exclusio alterius*, and limits her disposition to her will, which cannot become operative till after her death. This was the ground of the decision in *Wollaston* v. *King* (1), and it seems to me to be sound in principle. That case

(1) L. R. 8 Eq. 165.

is referred to both by judges and text-writers as correctly stating the rule of law on this subject, and showing the difference between general and special powers of disposition, coupled with life interests. A life interest with a general power of appointment of the fund by will or deed is equivalent to absolute ownership, and does not in any way tie up the fund in contravention of the rule against perpetuities; while a power limited to testamentary appointment prevents the donee from dealing with the fund by any act *inter vivos*. I am accordingly of opinion that the rule against perpetuities applies, and that the will and codicil of George Tredennick were inoperative beyond the life interest thereby appointed to Margaret Sarah Tredennick, and that upon her death the said portions of the trust funds was unappointed, and passed under the settlement as portion of the trust funds remaining unappointed, and are payable to the several children of the marriage then living, and the personal representatives of those who had died. The first question in the summons must be answered accordingly.

The second question does not arise in consequence of my decision on the first.

In order to answer the third question it will be necessary to have inquiries at Chambers as to what portions of the personal estate of Rev. George Tredennick are available to answer the several legacies, including that of £1200 to Margaret Sarah Tredennick, which will involve practically an administration of his personal estate, unless it is sufficiently shown that the securities, the interest and dividends of which are stated to have been paid to Margaret Sarah Tredennick during her life are those alleged to be dealt with by her will; and also special inquiry as to the manner in which the said interest and dividends were applied during her life, and where those securities now are.

An affidavit was filed with respect to the third question, and the case came again before the Vice-Chancellor, when he reserved his decision on the construction and effect of the will of Margaret Sarah Tredennick. The result of the affidavit is stated in his Lordship's judgment *post*.

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March 8.

THE VICE-CHANCELLOR:—

The question in the summons now remaining to be decided is, whether Margaret S. Tredennick by her will effectually exercised the power of appointment given to her by her father's will as regards the legacy of £1200 bequeathed by him out of his own personal estate by the codicil to his will of the 17th January, 1880.

The will of Margaret S. Tredennick does not refer to the will of her father, nor to the power of appointment therein contained, nor is the property in her will referred to, as having been her father's, but she dealt therewith as if it was her own. The persons claiming under her will contend that nevertheless it operated as an execution of the power in her father's will, as she had no property of her own answering to the description in her will, and as the property which she purports to dispose of was in fact part of the personal estate of her father and of the legacy of £1200 to which the power of appointment applied. They contend, therefore, that as the disposition of it which she purported to make cannot take effect in any way except by holding her will to be an exercise of that power, it must have been her intention to exercise it. It was necessary to ascertain whether these allegations of matters of fact were well founded, and at the close of the former argument I stated that an inquiry should be made at Chambers on the subject, unless the parties could agree upon a statement of the facts, and this part of the case stood over to see if such agreement could be arrived at.

Since then an affidavit has been filed made by Mr. Haughton, one of the trustees of a trust deed, dated the — day of February, 1881, purporting to be an appointment of new trustees of the fortune provided by the said will and codicil of said Rev. G. N. Tredennick for the said Margaret S. Tredennick, which goes very clearly and fully into the various securities and investments from time to time on which the fortune of said Margaret S. Tredennick has been standing, and the parties interested in this question admit the statements to be correct. It seems to be so accurate and reliable, that I do not consider any further inquiry on the subject necessary. It appears thereby that the sum received under said deed by the trustees thereby appointed comprised

with others a sum of £1188, being the amount of the pecuniary legacy of £1200 to which Margaret S. Tredennick was stated to be entitled under the codicil to the will of her father. From the affidavit of Mr. Haughton and the account therein referred to, it appears that the several securities and investments stated in the will of Miss Tredennick have been sufficiently traced backwards to the £1200 legacy, and represent it in the hands of the trustees of the deed of 1881. I am satisfied that the securities or investments mentioned in Miss Tredennick's will were produced by the £1200, and I therefore hold that her will was a valid execution of the power in her father's will as to the £1200 legacy.

The will of Miss Tredennick is so inaccurately expressed as to render it a matter of difficulty to ascertain her intentions. She does not make any express disposition of the capital, but in terms disposes of the dividends only, and these she gives in a very inconvenient and peculiar mode. She gives all the dividends paid into the Bank of Ireland to her account, due from January to July, upon the enumerated investments to her sister Mrs. Coffey and her daughters; and to her nieces the three Miss Logans, "the corresponding dividends of afore-mentioned securities payable from July to December." She evidently intended to divide the income into two equal parts, but she seems to have done so in an extraordinarily inconvenient way, as each set of relatives would have the whole income for one-half of every year and be without anything for the other half. If the words of the will were not too clear to admit of doubt on this subject, I should hesitate long before believing that this was really the intention of the testatrix, but I cannot give any other construction to the language she has used. I cannot defeat or vary the intention of the testatrix, and have only to construe her words and to give effect to her intention thus ascertained, no matter how inconvenient the result. I must therefore hold that the dividends on the investments due in each half-year are payable to the two sets of appointees alternately, they taking in equal shares as between themselves.

Then comes the still more difficult question, how is the capital to be treated. The rule is that a disposition of the income of property *primâ facie* carries the capital. So that, but for this shifting of the income from half-year to half-year the gift of the

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dividends, which I hold to be the income of every kind from the investments, and which is an indefinite gift, would carry the *corpus* of the investments. But it seems difficult to apply this rule, where there cannot be an absolute gift of the entire income to the same persons. The right to the income is not continuous but interrupted. The dividends of one-half year are to be paid by the trustees to A. and B. and in the other to C. and D. No doubt a trust for the purpose of handing the actual cash each half-year to the set entitled to it would be good if confined within the limits of the rule against perpetuities, but this would plainly not be sufficient to meet the intention of the testatrix. She did not intend to limit her appointment thus, for her language is absolutely indefinite: I think the only reasonable intention that can be imputed to her was to divide the capital absolutely between the two sets of relatives equally. The other alternative would be to hold that this gift was void for uncertainty. This I have no doubt would not have been that which the testatrix would have chosen if the question had occurred to her. No case at all resembling this was referred to by counsel, nor have I found any. On the whole I believe that I am best giving effect to the general intention of the testatrix if I construe her will to mean that there was to be an equal absolute division of the capital of these funds between the two sets of appointees as I mentioned above.

Solicitors: *D. & T. Fitzgerald* and *Orpen & Sweeney.*

D. M'C. M.

M'ALOON *v.* M'ALOON.

(1893—No. 24. 1893—No. 125.)

V.-C. 1900.

Feb. 16.
March 14.

Administration—Trading by administrator—Public-house—Rights of creditors of intestate and subsequent creditors of administrator.

On the death intestate of a publican and grocer his administratrix carried on the business, maintaining the intestate's family out of receipts therefrom, and continued such trading after decree for administration without any order authorizing her so to do. There were still unpaid creditors of the intestate, and the administratrix was in default.

Creditors in respect of goods supplied for the business after decree *held* not entitled to prove against the assets in priority to creditors of the deceased, or otherwise.

APPLICATIONS, by certain creditors of Sarah M'Aloon and James Bogue in respect of trading carried on by them as the administrators of Andrew M'Aloon, whose estate was being administered in Court, that the applicants' debts might be declared payable out of the assets of the deceased in priority to his creditors, and that if necessary the applicants might be at liberty to prove in respect of their said debts.

The circumstances under which the applications were made are stated in the judgment of the Vice-Chancellor. The order for the administration of the estate was made on the 24th January, 1893. The applicants' debts were incurred in 1895, 1896 and 1898. Sarah M'Aloon was found indebted to the estate on her account, and she had failed to bring in the certified balance, though ordered so to do. The licensed premises had been sold in 1899, under an order in the suit. Sarah M'Aloon and John Bogue had failed to pay rents to which the property of the intestate was subject, and arrears of same had been paid out of the proceeds of the sale.

Affidavits in support of the applications stated that with a view to the ultimate realization of the licensed premises and business it was necessary that same should be carried on as a going concern, and the business was from the death of the intestate

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carried on by Sarah M'Aloon, and subsequently by John Bogue with the full knowledge, assent, and approbation of all the creditors and next-of-kin of the deceased, that none of them ever objected to the trade being carried on, and that certain of those creditors had themselves supplied goods for the trading by the personal representatives.

Evidence was given on behalf of creditors of the intestate that they never consented to the carrying on of the trade by the administrators.

M'Cann and *Pim*, in support of the applications:—

In order that the property could be sold for its full value it was necessary to keep up the license and carry on the trade so as to sell the premises and business as a going concern. The applicants by supplying goods enabled this to be done. The trading was carried on with the knowledge of the creditors and next-of-kin, they never objected, and must be taken to have assented. The applicants are entitled in priority to the intestate's creditors: *Dowse* v. *Gorton* (1), *Brooke* v. *Brooke* (2), *Hodges* v. *Hodges* (3).

Drummond, Q.C., for creditors of the deceased:—

The principle to be found in the cases cited is that where an executor is *himself* entitled to an indemnity as against creditors of the deceased, then the creditors of the executor may stand in his place and claim directly against the assets in priority to the deceased's creditors. Here Sarah M'Aloon is in default to the estate and has no right to any indemnity, and the applicants are not entitled to prove against the assets: *Morris* v. *Latchford* (4), *Dowse* v. *Gorton* (1), and the judgment there (p. 203) of Lord Macnaghten.

Donaldson, for the defendant.

F. N. Greer, for the plaintiffs:—

In the cases cited for the applicants the trading was carried on under an order of the Court or a direction in a will: even an authority by will to carry on a business would be determined by a decree for administration.

(1) [1891] A. C. 190.
(2) [1894] 2 Ch. 600.
(3) [1899] 1 I. R. 480.
(4) 23 L. R. I. 333.

M'Cann, in reply:—

In *Brooke* v. *Brooke* (1) the will contained no power to carry on the business.

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M'ALOON v. M'ALOON.

March 14.

THE VICE-CHANCELLOR:—

The question now to be decided arises upon a claim put forward by persons who supplied goods to the successive personal representatives of A. M'Aloon, to be admitted to claim upon the assets of the deceased as creditors for the price of the goods so supplied.

The facts are shortly these: The intestate, who died in the year 1892, had for some years, and up to his death, kept a small public-house and grocer's shop, getting goods for sale on credit, as is usual in such cases. At his death he was indebted to a number of persons for the price of goods so supplied and for other simple contract debts. He left a wife and several children who had lived with him on these premises up to his death. His widow continued to carry on the business as theretofore carried on by her husband. She obtained administration to him soon after his death. Matters went on in the same way to her death, in the year 1896. On her death administration *de bonis non* to the intestate Andrew M'Aloon was obtained by John Bogue, who took upon himself the management of the public-house and shop, and carried on the business there.

The children were supported out of any money that came to the hands of the widow, and after her death to the hands of Bogue, just as they had been in the life of the husband, and no appropriation was made in any way of the moneys so received, all that came to hand being applied indiscriminately to pay for maintenance or for goods supplied to the public-house and shop.

The widow owed a considerable balance on her account of her husband's personal estate, which is still due. There are several debts due by the intestate at his death remaining still unpaid, and these have been admitted to proof by the Chief Clerk. They consist chiefly of debts due by the intestate for goods supplied him for his business. But claims have also been sent in by persons

(1) [1894] 2 Ch. 600.

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who supplied goods for the like purpose, first to the widow and afterwards to Bogue, and these parties now claim to have their debts paid out of the assets of the intestate, and not only this, but to have priority over the debts due by the intestate at his death. They contend that as the business of the intestate was continued by his administratrix with goods supplied by them to her for the purpose, the estate of the intestate has in some way been improved, or at least preserved, and that they stand in some relation to the estate of the intestate analogous to the relation of salvage creditors. They especially rely on the continuance of the public-house with any rights to its license and of the business carried on upon the premises as being a valuable asset.

In my opinion, this contention is incapable of being supported either in point of law or in point of fact.

The trading was carried on by the widow, without any authority for doing so, although it is stated in several of the affidavits on behalf of the applicants that the business was carried on under an order of this Court. This was admitted to be a mistake, as no such order was ever made. The case being one of intestacy there could be no testamentary authority, and there was no authority of any kind given by this Court. It was therefore the unauthorized action of the administratrix. She therefore carried it on at her peril, and she alone was responsible for all debts incurred by her. The trading was her's in her personal, and not in her representative, capacity. The assets of the intestate are not liable for payment of the debts she so incurred. The same observations apply to the dealings of John Bogue. The case of *Dowse* v. *Gorton* (1) contains much valuable exposition of the doctrine as to executors carrying on the trade of their testator after his death, but it does not in its facts resemble the present case, nor was any such decision involved in it, for there the executors had full authority to carry on the trading. The law as I have stated it, is not therefore in any way affected by the decision there. It was contended that, admitting the law on the subject to be as I have stated it, there was such acquiescence on the part of the creditors of the intestate, that they must be presumed to have given their assent to the carrying on of the trading by the representatives of

(1) [1891] A. C. 190.

the intestate, and are therefore precluded from now complaining of what they have done. I fail to see anything here amounting to such acquiescence. The judgments in *Dowse* v. *Gorton* (1) are of importance on this point also, and show that merely refraining from interfering and enforcing payment of their demands is not an acquiescence.

But in addition to the other grounds supporting the view I take of the case, there is the equally conclusive answer to the claim that the right to any such preference as these creditors now claim exists only where the personal representatives are not in any default. An authority for this will be found in the decision of the Master of the Rolls in *Morris* v. *Latchford* (2), which states the rule of law on the subject. That rule is, that where personal representatives are not in any default, they are entitled to an indemnity out of the assets against debts incurred by them in carrying on a duly authorized trading, and that the creditors to whom they have incurred such liability will be held in equity entitled to stand in the place which the personal representatives would have held if they had actually paid their demands. It follows from this, that such creditors cannot have this right where personal default exists in the representatives which would disentitle them to claim an indemnity until they have made good such default.

Now here there has been a number of such defaults, and the personal estate has been most seriously wasted by their misconduct.

The rights of the parties are to be ascertained as of the time the intestate died. His debts are to be found as they then existed, and the assets to be taken as they then stood. The creditors at the death of the intestate are entitled to have the assets so far as possible realized for payment of their debts.

I therefore refuse the applications with costs.

Solicitors for applicants: *Murphy*, and *Molloy & Molloy*.
Solicitor for creditors of the intestate: *Riordan*.
Solicitor for the plaintiffs: *Henry*.
Solicitor for the defendant: *Knight*.

D. M'C. M.

(1) [1891] A. C. 190. (2) 23 L. R Ir. 333.

Appeal.
1900.

KNIPE *v.* BLAIR (1).

Jan. 22, 29. *Bond—Penalty—Interest—Payments made of interest as such—Administration suit—Payment by receiver.*

After a decree for administration of real and personal estate, a receiver who had been previously appointed by deed to collect the rents of the landed property of the deceased, and to keep down the interest on the incumbrances, and who was also a mortgagee in possession, was left undisturbed in possession by the Court. One of the incumbrances was a bond debt for £500, on which judgment had been entered, and the judgment was registered as a mortgage against the lands. Interest was paid by the receiver, under orders of the Court, for a number of years to the bond creditor, and accounts were passed in the suit, and embodied in the final decretal order, showing that the payments were appropriated to interest, and that the principal sum of £500 was due to the bond creditor at the date of the final order, 17th December, 1867. Further payments were made by the executors of the deceased, and by the Court receiver —all expressly on account of interest—down to January, 1897. The total amount of the payments exceeded the penalty of the bond. All creditors prior to the bond creditor had been paid off, when some further lands were sold, the proceeds of which came to be allocated. The bond creditor claimed to be paid £500 for principal, and the interest accrued since January, 1897. A subsequent creditor having challenged the right of the bond creditor to receive anything further than the amount of the penalty of the bond :—

Held, that the payments having been made as interest, and applied as such, and the amount of the interest due at any one time, together with the principal, never having reached the penalty, the rule which prevents a bond creditor from being paid more than the amount of the penalty did not apply.

Hatton v. *Harris* ([1892] A. C. 547) distinguished.

By a bond dated the 11th January, 1858, John Lawson Cross became bound to Thomas Henry Harper and Edward Johnston (as trustees of the settlement dated the 10th January, 1858, made on the marriage of W. F. M'Clintock and Maria Johnston) in the sum of £1000, conditioned for payment of £500 with interest at £6 per cent. per annum to be paid half-yearly so long as the

(2) Before Palles, C.B., and Fitz Gibbon, Walker, and Holmes, L.JJ.

said sum should remain due on the security thereof. There was a warrant of attorney of even date with the bond to confess judgment for the penal sum of £1000, and on the 29th January, 1858, judgment was entered for the penal sum with costs. On the 1st February, 1869, the judgment was registered as a mortgage against the lands of Maydown, Drumduff, Carrickaness, and Killymaddy, the property of the defendant, in the county of Armagh.

By a mortgage dated the 29th December, 1858, John Lawson Cross mortgaged his freehold estates, including part of the lands against which the judgment was afterwards registered as a mortgage to Thomas Henry Harper and Edward Johnston (the obligees of the bond) as trustees for Margaret Johnston to secure £1000; and by this deed Harper and Johnston were appointed receivers of the rents and profits of the mortgaged lands, and they were directed to apply the rents after payment of outgoings, in payment of interest on the £500 secured by the bond in question, and the judgment entered thereon; next in payment of the interest to accrue due upon the £1000 secured by the mortgage; and subject thereto, and without prejudice to the right of Margaret Johnston to have the residue of the lands applied in payment of her principal, to pay the same to John Lawson Cross, or as he should direct.

Harper and Johnston entered under this deed as receivers, and continued to receive the rents until 1871, and during that period they paid Mrs. M'Clintock, yearly, her interest upon the bond for £500.

John Lawson Cross died on the 21st September, 1862, having by his will appointed Thomas Henry Harper and Robert Knipe his executors and trustees. Knipe proved the will, Harper having renounced, and on the 8th December, 1863, Knipe filed a cause petition to administer the real and personal estate of John Lawson Cross. The petition was referred to Master Litton on the 12th December, 1863, under section 15 of the Chancery Act (Ireland) 1850.

Margaret Johnston, the mortgagee, accounted in that suit for the rents received by her trustees out of the mortgaged lands, to the year 1867, and she took credit for the sums paid for interest to

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Mrs. M'Clintock on foot of the bond for £500. By order of Master Litton, dated the 26th October, 1865, these accounts were adopted.

By the final decretal order dated the 17th December, 1867, it was declared that the testator's lands were chargeable with the incumbrances mentioned, which included the bond and the judgment thereon, and also the mortgage for £1000; and the order further declared that £500, exclusive of interest, was due upon the bond and judgment. By order of the Master the lands were directed to be sold in the Landed Estates Court. On the 11th March, 1871, an affidavit was sworn by Edward Johnston, one of the mortgagees in the Landed Estates Court, accounting for the rents received by the mortgagees, in which credit was taken for payments of interest to Mrs. M'Clintock down to the 11th January, 1870. Part of the lands were then sold, and out of the proceeds of the sale the mortgage for £1000 was paid. After that, Knipe the executor and trustee of the will of J. L. Cross, went into possession.

On the 18th March, 1872, Harper and Johnston assigned the judgment and statutable mortgage for £500 to George Rice. Robert Knipe, as executor of J. L. Cross, was a party to this deed, which contained a recital that the principal sum of £500 was then due on foot of the statutable mortgage, but that all interest therein had been paid up to date. Knipe, the executor, paid the interest on the bond to George Rice.

Robert Knipe died in or about the year 1876, and on the 23rd March, 1880, letters of administration *de bonis non* to John Lawson Cross were granted to William Couser, and by order of the 24th March, 1880, he was appointed receiver over the unsold lands. By an order dated the 21st April, 1883, Couser was allowed credit for payments of interest made on foot of the bond, and also for the continuing half-yearly payments until further order. Payments were made by Couser upon foot of this order down to the year 1897. The total amounts so paid for interest on the bond amounted to the sum of £1179.

In the year 1898 the lands of Carrickaness, held under tenancy from year to year, part of the property of the deceased, were sold for £1500, and an application was made at the chambers of the

Lord Chancellor to ascertain the priorities of the incumbrances on this fund. Mrs. Campbell, as assignee of the bond, claimed to be entitled to £500 for principal and interest since 1897. She was opposed by William Couser, the owner of the next bond debt, on the ground that the total amount of payments received by her had reached the amount of the penalty of the bond. The case came before the Lord Chancellor on the 17th June, 1899; but the only question argued before His Lordship was, whether the registration of the judgment as a mortgage had the effect of distinguishing the case from the decision of *Knipe's Estate* (1) (affirmed in the House of Lords, *sub. nom. Hatton* v. *Harris* (2)). On the 29th July, 1899, the Lord Chancellor delivered judgment, and decided that the case was governed by *Hatton* v. *Harris* (2), and that the registration of the judgment as a mortgage did not prevent the operation of the rule. From that decision Mrs. Campbell appealed.

Ronan, Q.C., and *C. Murphy*, for the appellant:—

This case does not fall within the class of cases which lays down that a bond creditor cannot receive more than the amount of the penalty of his bond. If the arrears of interest at any time due, together with the principal, had reached the penalty, the rule would have applied, but in this case the penalty was never reached. The case may be considered in three stages—1, the appellant's right under the bond; 2, his rights under the judgment, and 3, his rights under the decree to account.

1. His rights under the bond were these—I shall repay you £500, and interest half-yearly at £6 per cent., and I reserve my right to put an end to this contract at any time by paying to you a sum of £1000. But he had not the option of saying—I shall repay you £1000 by annual instalments of £30 each.

2. The judgment did not affect the rights under the bond. It is a security for future breaches, and security alone; but there were no breaches so long as the debtor paid interest.

3. Under the decree. The decree for administration did not alter the creditor's contract: the Court had no power to alter the

(1) 27 L. R. Ir. 512. (2) [1892] A. C. 547.

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contract with the creditor. *Clarke* v. *Seton* (1) states what is the effect of a decree for administration by a legatee. It does not give the obligor the right to pay £1000 by instalments.

Past payments of interest by the Court are the same as past payments by an individual: here a Court of Equity has by its receiver paid interest, but only on the £500, thus treating the original contract as subsisting.

Hatton v. *Harris* (2) is not an authority against us. There the House of Lords was of opinion that an error had been made in one order of the Court, which could be amended under the Slip Order. That is totally different from a course of dealing with the rents of the property, extending over a series of years, and confirmed by different orders of the Court.

[They also referred to *Bower* v. *Marris* (3), *Grosvenor* v. *Cook* (4), *Walters* v. *Meredith* (5).]

Matheson, Q.C., *Samuels*, Q.C., *Maxwell*, and *Davison*, for the respondents:—

All that the bond creditor can recover is £1000; once the penalty is reached, all payments must be taken to have been made in reduction of the aggregate of the amount due: *Stewart* v. *Rumball* (6), *Kettleby* v. *Kettleby* (7). The rule is the same in the administration of assets, where a receiver is appointed over the lands under an order of the Court, unless the bond creditor has gone into possession: *Crispe* v. *Blake* (8), *Moore* v. *M'Namara* (9), *Mackworth* v. *Thomas* (10), *Trepaud* v. *Cormick* (11), *Hughes* v. *Wynne* (12), *Upton* v. *Upton* (13), *Pomeroy* v. *Ponsonby* (14), *Gregg* v. *Glover* (15), *Mathews* v. *Keble* (16). In *Purcell* v. *Blennerhassett* (17) there was a declaration in the decree that a bond should be paid with interest from the date of the bill, and yet

(1) 6 Ves. 411.
(2) [1892] A. C. 547.
(3) Cr. & Ph. 351.
(4) 1 Dickens, 305.
(5) 3 Y. & C. 264.
(6) 2 Vern. 508.
(7) Dickens, 514.
(8) Cas. in Chanc. 23; 1 C.P. Cooper, p. 210.
(9) 1 B. & B. 309.
(10) 5 Ves. 329.
(11) 1 Hog. 277.
(12) 1 M. & K. 20.
(13) 6 Ir. Eq. R. 471.
(14) 6 Ir. Eq. R. 475, n.
(15) 5 Ir. Eq. R. 127.
(16) L. R. 4 Eq. 467.
(17) 10 Ir. Eq. R. 470.

that was not enough to exclude the rule. The last decision upon the question is *Hatton* v. *Harris* (1), where the decision of this Court, *sub nom. Knipe's Estate* (2), was affirmed, holding that the creditor was not entitled to receive more than the amount of the penalty.

After trustees have invoked the aid of the Court in administering an estate, and a decree has been made, they cannot do any act effectively in the matter of the administration except under the sanction, or according to the course, of the Court: *Minors* v. *Battison* (3).

The judgment of the Court was delivered by—

Jan. 29.

THE LORD CHIEF BARON:—

This is an appeal from an order of the Lord Chancellor, by which it was declared that the appellant could not recover, on foot of a certain bond, more than £1000, after giving credit for all sums paid to her, or her predecessors in title, *by way of interest* or otherwise.

The bond in question, which bears date the 10th January, 1858, was executed by John Lawson Cross to Thomas Henry Harper and Edward Johnston, as trustees of the marriage settlement of Mr. M'Clintock and Miss Margaret Johnston. It was in the penal sum of £1000, and was conditioned for payment of £500, with interest at 6 per cent. on 1st August and 1st February "in each and every year, so long as the said sum shall remain due upon the security of these presents."

Judgment was entered upon this bond for the penal sum of £1000 and costs on the 29th January, 1858; and on 1st February, 1859, that judgment was registered as a mortgage against certain lands, the proceeds of the sale of part of which are now in Court, and are being administered in this cause petition matter.

Interest upon the bond was paid yearly from its date until January, 1897, and the respondent insists that the sum so paid for interest should be credited as against the £1000, the penalty of the bond, as directed by the order under appeal, and that consequently the entire £1000 has been paid off, and therefore that although the £500 principal admittedly remains due, there is no

(1) [1892] A. C. 547. (2) 27 L. R. Ir. 512. (3) 1 App. Cas. 428, 453.

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mode of recovering it, by reason of the undoubted rule that no sum beyond the penalty can be recovered on such a judgment. Whether he is right in this contention is the question for decision.

The argument before the Lord Chancellor was of rather a superficial character. It was no more than that a judgment creditor, by registering his judgment as a mortgage, entitled himself to recover, out of the lands charged by the registration, a greater amount of interest than he would have been entitled to out of the general assets of the debtor, had the judgment not been registered as a mortgage. This contention was expressly abandoned before us. Other arguments, however, were pressed upon us by Mr. Ronan, which were not brought under the consideration of the Lord Chancellor; and although this is an inconvenient course, as the arguments arise on admitted facts and documents in evidence, I do not see my way to refuse to consider them. The course of procedure, however, has had this disadvantage, that we are acting almost as a Court of first instance, instead of as an appellate tribunal, as admittedly the order of the Lord Chancellor was right in reference to the arguments before him.

The material facts upon which the question arises are these:—

By a mortgage of 29th December, 1858, the provisions of which were not brought under the notice of the Lord Chancellor, John Lawson Cross mortgaged his freehold estates, including part of the lands against which the judgment was afterwards registered as a mortgage, to the same Edward Johnston and Thomas Henry Harper, as trustees for Margaret Johnston, to secure £1000. By this deed Harper and Johnston were appointed receivers of the rents and profits of the mortgaged lands, and they were directed to apply the same, after payment of outgoings, in payment of interest on the £500 secured by the bond in question here and the judgment thereon; next, in payment of the interest to accrue due upon the £1000 secured by the mortgage; and subject thereto, and without prejudice to the right of Margaret Johnston to have the residue of the lands applied in payment of her principal, to pay the same to John Lawson Cross, or as he should direct.

At the time of the execution of this deed, the judgment, as it had not been previously registered as a mortgage, was not a

charge upon the lands; but as the mortgagees and the judgment creditors were the same persons, there is no reason to suggest that the trust of the rents and profits for payment of the interest on the £500 was not valid and enforceable.

Under this deed Thomas Henry Harper and Edward Johnston entered as receivers; and as such continued to receive the rents and profits until the year 1871; and during this period they paid Mrs. M'Clintock yearly her interest upon the bond of £500. The payments made during these thirteen years are some of those directed by the order appealed from to be credited as against the penalty.

John Lawson Cross died upon the 21st September, 1862, having by his will appointed Thomas Henry Harper and Robert Knipe his executors and trustees. Knipe proved the will, Harper having renounced; and on the 8th December, 1863, filed a cause petition for the administration of the real and personal estate of John Lawson Cross. This petition was, on the 12th December, 1863, referred to Master Litton, under sect. 15 of the Chancery (Ireland) Regulation Act, 1850.

Margaret Johnston filed accounts in that suit of the rents received by her trustees out of the mortgaged lands, to the year 1867, and took credit against such receipts for the sums theretofore paid for interest to Mrs. M'Clintock on foot of the £500.

By an order of the Master of the 26th October, 1865, these accounts of Margaret Johnston were adopted; and having been carried on, were embodied in the Master's final decretal order of the 17th December, 1867. It was also declared by that order, that the testator's lands were chargeable with certain incumbrances, including the bond, and the judgment thereon which had been registered as a mortgage, and also the mortgage for £1000. The order further declared that £500, exclusive of interest, was due upon the bond and judgment; and it also ascertained the sum due upon the mortgage.

The ascertainment of the latter sum involved the taking of the account of the sums received by the mortgagees on foot of the rents and profits, and the disposition thereof, as any surplus rents not duly disposed of would have been good credits against the principal secured by the mortgage. This decretal order, therefore

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amounted to a judicial determination that the application of those rents, as set forth in that order, including the payment thereout of the various gales of interest on foot of the £500, was rightful, and bound all the parties in the suit. The order did not appoint a receiver or otherwise disturb the possession of the mortgagees, who, as I said, continued in receipt of the rents and profits.

By an affidavit sworn by Edward Johnston, one of the mortgagees, on the 11th March, 1871, in the Landed Estates Court, in the matter of the estate of John Lawson Cross—a matter which had been instituted under the direction of Master Litton (the Judge in the Chancery matter) for sale of the mortgaged lands—the account of the rents received by the mortgagees was carried on to the year 1871. In that account credit is taken for further payments of interest to Mrs. M'Clintock to the 11th January, 1870. Upon the basis of this account, the sum due on the mortgage was judicially ascertained by one of the Commissioners of that Court; and the sum so ascertained was paid to the mortgagees out of the proceeds of part of the lands of John Lawson Cross, which had been sold by that Court.

Although as regards the rents and profits received before sale, the trust to pay the interest on the judgment was prior to that for payment of interest on the mortgage, the mortgage was a charge upon the *corpus* of the estate prior the judgment. The sum due on the mortgage was therefore paid in priority to the judgment, and this payment exhausted the entire proceeds of the part of the lands then sold, save a sum under £20.

The mortgage having been thus paid, the mortgagees appear —and I think rightly—to have gone out of receipt of the rents of the unsold lands; the judgment creditors did not apply for a receiver, and Knipe, the executor and trustee, entered into receipt.

On the 18th of March, 1872, Thomas Henry Harvey and Edward Johnston assigned the judgment and statutable mortgage for £500 to George Rice. Knipe the executor, on the execution of this assignment, paid the interest then due on the bond, and he, or his executor, continued up to the end of 1879 to pay Rice the accruing gales of such interest, and it is admitted by the

respondent, that Knipe and his executor *accounted for these payments* in this matter.

The only inference consistent with this state of facts is that Knipe, as executor and trustee, fulfilled the obligation to which he would have been subject, had there not been any pending suit, of paying the interest in fulfilment of the contract of his testator, and that his action in so doing was held in this matter to have been in due course of administration.

On the 23rd March, 1880, William Couser, the respondent here, obtained administration *de bonis non* to John L. Cross, and by order of 24th March 1880, he was appointed receiver over the unsold lands, upon which the registered judgment continued to be a charge. By an order of 21st April, 1883, made upon his application, it was ordered that he should be allowed credit for payments of two half-yearly gales of interest made by him to George Rice as assignee of Harper and Johnston, *and for the continuing half-yearly payments of such interest until further order*. Payments for such interest were made by Couser under this order, until the year 1897.

These were the circumstances under which the sums directed by the order under appeal to be credited against the £1000 penalty were paid as interest. I have gone through them at such wearisome length, for the purpose of showing that every such payment was either directed by the Court of Chancery in the Chancery matter to be paid as interest, or was adopted by that Court, or by the Landed Estates Court, as a payment of interest. Each of the payments thus specifically made for interest must, as regards Couser (the respondent here, who is bound by the proceedings in this suit, and in the Landed Estates Court matter), and also as regards all other creditors who have come in in this suit, be conclusively deemed to have been rightfully made, for the purpose, and on the account on which they were in fact made and accepted —that is, for interest.

Thus the question is, is a payment which is made and accepted specifically on account of interest upon such a bond as that of the 11th of January, 1858, a payment upon account of the penalty of the bond, so that when such interest has been paid as such for thirty-four years, the entire penalty is to be deemed to have been

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satisfied, and thus the principal upon which the interest had been paid, although admittedly due, has become irrecoverable.

The first matter to be considered is one of construction; what are the terms of the contract contained in the bond, as formerly regarded in equity, and as now looked upon both at law and in equity?

The first term of the contract is that the obligor shall pay £500 on demand, and that so long as that sum shall remain unpaid he will pay interest at 6 per cent. by the specified half-yearly gales. The second term is that if the principal and interest be not so paid, that then the obligor will pay £1000 as a penalty. The penalty, however, does not become payable so long as the first term of the contract continues to be performed. Now, every payment of interest is made in performance of the contract, and is accepted as such performance; and therefore each such payment instead of being made on account of the penalty, is made upon a basis which is inconsistent with the penalty being recoverable. The payment is on the basis of performance of the contract, while the penalty does not become payable until the breach of that contract, and *ex hypothesi* upon there not having been a breach. If, therefore, judgment had not been entered upon the bond, I should have been of opinion that the character in which these sums were paid and accepted in itself negatived the right of the respondent to have them treated as paid upon account of the penalty; and it cannot, as it seems to me, make any difference that judgment has been entered upon the bond, and that that judgment has been registered as a mortgage. The sum due under the statutable mortgage is the sum due upon the judgment, and the sum due upon the judgment is that due upon the bond.

I admit that had the sums paid for interest been *recovered* upon foot of the judgment, the case would have been otherwise, because nothing can be so recovered but the penalty, or something on account of the penalty, but sums voluntarily paid by a debtor, or his executor or trustee, in performance of a contract can in no sense be treated as *recovered*.

I should like to illustrate this view by two analogous cases. Take the case of a bond given by the grantor of an annuity to secure its punctual payment, with a warrant to confess judgment

thereon, and judgment accordingly. Execution could not issue upon such a judgment until there had been a suggestion of breaches of the condition of the bond; and had there been such a suggestion, and execution thereon, the penalty of the bond, reduced by such sum as might be levied under the execution, would remain as a security against future breaches. Had there been a due payment of a gale of the annuity upon the day appointed for payment, a breach for its non-payment could not be suggested. There could not, therefore, be execution for the amount, and therefore the penalty could not be reduced by the amount of the payment. In the above case I have assumed the payment to have been made *ad diem*; but if it were made *post diem*, and accepted as if paid *ad diem*, instead of being treated as a breach, then the result would be the same; and it necessarily would be so treated if a breach were not suggested. A suggestion is the only mode of recovering as for a breach. It follows that, in the case of such a bond as I have mentioned, so long as the annuity was paid without a suggestion of breaches, the amount of the penalty recoverable would not be reduced.

Take, next, a contract by a principal to pay a certain sum upon demand, with interest half-yearly until paid, and a bond *by a surety* in a penal sum to secure performance of that contract. In such a case, so long as the interest was either paid *ad diem*, or, being paid *post diem*, was accepted by the creditor, the bond of the surety could not be treated as forfeited, by reason of the delay in payment of the interest, and therefore payment of the interest by the principal could not reduce the penal sum in the surety's bond.

These cases show more clearly than that before us the difference between the effect upon the penalty of a bond of sums paid and accepted as in performance of the contract to secure which the bond was given, and sums paid as for damages upon a breach of that contract. The principle, however, governing those cases applies equally in the present.

I asked Mr. Samuels if he could refer to a single case in which the payment of interest was ever credited against the penalty of a judgment. He admitted that *Pomeroy* v. *Ponsonby* (1) was the

(1) 6 Ir. Eq. R. 475, n.

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solitary one in which such a credit was allowed. The figures there, which I have carefully calculated, show that at the time of the payment the penalty had been reached; and all through the subsequent cases this element in the decision is pointedly referred to. In such a case as that a new element comes in. What used to be called the equitable debt, viz. the amount of principal and interest due, having become equal to the legal debt, the penalty, the one merges in the other. There is but one debt, the legal penalty, which of course does not bear interest. Half of that legal debt has become recoverable by reason of non-payment of previous interest. If then a payment is made on foot of interest, it cannot be so made on account of interest which accrued since the penalty was reached, as there has been none such, it must therefore have been paid on interest which had previously accrued, and which is included in the penalty. It must accordingly be credited against the penalty. As against all this, the respondents rely upon *Hatton* v. *Harris* (1); but there the question was, not the effect of a payment made before the penalty had been reached, but the amount due at a time after the penalty had been reached. The real matter involved was no more than the mode of getting rid of an ill-drawn and erroneous decree; but for that decree it would not have been possible to argue that more than the penalty was recoverable.

The effect of the decision therefore was as to the manner in which an erroneous decree, might be altered, because unless the erroneous decree was altered under the Slip Order effect would have to be given to it. It was admitted that there was an error. Before the argument concluded, it was put to the counsel for the appellant whether they desired that the case should be adjourned in order that it might go back to have an application made in the suit for the correction of the decree. But the learned counsel assented to the case being dealt with upon the footing that such an application had been made, and that the decree should be treated as amended. The House of Lords, therefore, without an application having been actually made to amend the decree, treated it as amended, and held that effect should be given to it as amended. Apply that to this case. We have here parties

(1) [1892] A. C. 547.

coming in under the decree of 1859, and asking for payment of interest; we have the application of the rents since 1865, towards interest; we have that affirmed by the decree of 1875, and the rents applied in payment of interest; we have a course of practice from that time till 1882, in consonance with such applications; we have in 1882, a decree of the Lord Chancellor sanctioning that practice and directing future payments on account of interest; and now it is contended that all that is wrong, that no effect is to be given to it, and that if anything were wrong in these previous orders, *Hatton* v. *Harris* (1) is a conclusive authority that it cannot be acted upon.

At the same time I do not decide that there was anything wrong in these orders. When the trustees went out of possession, this bond was the first incumbrance, and it was competent for the Court to apply the assets of the testator in performance of the terms of the bond, if it thought that to be for the benefit of the estate.

Upon these grounds, and without expressing any opinion on the other questions argued, I think that the order appealed from ought to be discharged, and that in lieu thereof there should be a declaration that the sums paid on account of interest should not be deducted from the £1000, the penalty in the bond. The appellants should have their costs before the Lord Chancellor and here with their respective demands, and Couser's costs should be part of his costs as administrator.

Solicitors for the appellant: *Monroe & Anderson.*

Solicitors for the respondents: *Thompson & M'Laughlin*, and *J. E. Peel.*

R. D. M.

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Appeal.
1900.

April 24, 25.
May 10.

SHERIDAN *v.* O'REILLY (1).

Will—Construction—Gift to five legatees—Remainder to eldest male issue—Gift over in default of such issue—Vesting—Persona designata.

A testator bequeathed his property to trustees upon trust that the rents and profits should be divided into five equal parts, to be paid half-yearly to each of his five nephews, share and share alike, "to be by them enjoyed during the period of their natural lives, and after the decease of each to their eldest male issue, respectively, of each, and in default of such male issue such share to revert to the remaining legatees, or their eldest male issue, to be divided equally every half-yearly term among them." All the testator's nephews survived him. Three of them died subsequently, intestate and unmarried; one (the husband of the plaintiff) died, having had a son who predeceased him, intestate and unmarried; and the fifth nephew was still alive:—

Held, by Porter, M.R., (1) That the gift of the income of the property amounted to a gift of the *corpus*; (2) That the gift after the decease of each to their eldest male issue, respectively, of each, meant to the eldest male issue living at the decease of each; (3) That the words "remaining legatee" meant surviving legatee, and that accruing shares went absolutely to such legatee; (4) That the plaintiff was entitled, pursuant to the foregoing declarations, as personal representative of her husband, F. S., to his accrued shares of the personalty, but as representative of her son she took nothing.

Held, on appeal, as to the 2nd declaration of the decree, and as to so much of the 4th declaration as declared that as personal representative of her son the plaintiff took nothing (varying the decree of Porter, M.R.), that the son of F. S. took a vested interest at birth, and that the gift to him was a gift to a *persona designata*, and not to a class.

By his will, dated the 9th January, 1846, Farrell O'Reilly bequeathed all his property to the Rev. Farrell Sheridan, the Rev. Francis O'Farrell, and to his brother James Sheridan, and his son Patrick Sheridan, and to the testator's brother Thomas O'Reilly, and his son Thomas O'Reilly (the younger), upon certain trusts which he expressed in the following words—"I will

(1) In the Court of Appeal before Lord Ashbourne, C., and Walker and Holmes, L.JJ.

that the yearly income rents issues dividends or profits of all my property be divided into five even and equal parts to be paid half yearly at the most convenient period after falling due, say February and August, to each of my five nephews as undermentioned share and share alike; I will one-fifth part of said yearly income to Edmund O'Reilly one-fifth part to John O'Reilly one-fifth part to Charles O'Reilly one-fifth part to Hugh O'Reilly sons of the said Thomas O'Reilly my brother and the remaining fifth part to Farrell Sheridan son of the said James Sheridan to be by them enjoyed during the period of their natural lives and after the decease of each to their eldest male issue respectively of each and in default of such male issue such share to revert to the remaining legatees or their eldest male issue to be divided equally every half yearly term among them."

The testator appointed the Rev. Farrell Sheridan and James Sheridan executors, or in the event of their decease, the Rev. Francis O'Farrell and Patrick Sheridan.

The testator left a considerable amount of personal property and also a small amount of real estate in the county of Cavan. The testator died on the 6th November, 1846, and probate was granted to the Rev. Farrell Sheridan, and upon his death in 1850, letters of administration *de bonis non* were granted to the Rev. Francis O'Farrell and the Rev. Patrick Sheridan. On the deaths of the Rev. Francis O'Farrell and the Rev. Patrick Sheridan, and on the renunciation of letters of administration by Thomas O'Reilly the younger (the surviving legatee in trust named in the will of Farrell O'Reilly) letters of administration of the personal estate of Farrell O'Reilly were granted to Hugh O'Reilly the defendant and Farrell Sheridan.

Of the legatees named in the will, Edmund O'Reilly died intestate and without issue in the year 1850, John O'Reilly died intestate and unmarried in the year 1850, Charles O'Reilly died intestate and unmarried about 1845, Hugh O'Reilly was still alive and unmarried, and Farrell Sheridan died in December, 1897, leaving him surviving his widow, Rose Sheridan, the plaintiff, and three daughters: he had also one son John James Sheridan, who died a minor, unmarried, in 1870.

In September, 1899, letters of administration with the will

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annexed of Farrell Sheridan, were granted to the plaintiff, Rose Sheridan, and also letters of administration to John James Sheridan.

Farrell Sheridan received half the dividends arising from the invested property up to the time of his death, the other half being paid to the said Hugh O'Reilly.

Mrs. Rose Sheridan issued an originating summons for the purpose of having the construction of the will of Farrell O'Reilly decided by the Court, and the questions raised were :—

1. Whether the gift in the will of the income amounted to a gift of the *corpus* ?

2. Whether the gift, "after the decease of each to their eldest male issue respectively of each," meant to the eldest male issue living at the decease of each or eldest male issue born ?

3. Whether "remaining legatee" means surviving legatee, and whether accruing shares went absolutely to such legatee ?

4. Whether the plaintiff as personal representative of Farrell Sheridan and administratrix of John James Sheridan, in the events which had happened, was entitled to the following shares, viz. :—

(*a*) As administratrix of Farrell Sheridan, the sole next-of-kin of his son John James Sheridan, and as administratrix of John James Sheridan to one-fifth share.

(*b*) On the death of Edmund O'Reilly, one of the legatees, to one-fourth of one-fifth.

On the 13th February, 1900, Porter, M.R., gave judgment and decided :—

1. That the gift of the income of the property amounted to a gift of the *corpus*.

2. That the gift, "after the decease of each to their eldest male issue respectively of each," meant to the eldest male issue living at the decease of each.

3. That the words "remaining legatee" meant surviving legatee, and that accruing shares went absolutely to such legatee.

4. That the plaintiff was entitled, pursuant to the foregoing declarations, as personal representative of her husband, Farrell Sheridan, to his accrued shares of the personalty, but as representative of her son, she took nothing.

The judgment of THE MASTER OF THE ROLLS was as follows:—

The principal question in the case is what meaning is to be placed upon the word "issue" in this will. That it is a word of very flexible import cannot be questioned. It may mean children, or it may include all descendants. If the former meaning is to be placed upon it here, it is a word of purchase. If the latter, it must be construed as equivalent to heirs of the body. Male issue would then be the same as heirs male of the body, and as each nephew took an estate for life in the same instrument the rule in *Shelley's Case* (1) would apply, and he would be at once tenant in tail male so far as the lands are concerned. The rule that words, which in a will would confer an estate tail in realty will give an absolute interest in personalty, is not strictly accurate in all cases; and the distinction is clearly settled, that whereas a devise of lands to one for life, and after his decease to his issue, gives him an immediate estate tail, the same words, in a bequest of personalty, only gives a life interest to the first taker, the issue taking as purchasers. The origin of the distinction, is that as to realty, the rule is derived from the principles of land tenure, which have no direct application to personal property.

As to personalty, the case of *Knight* v. *Ellis* (2), before Lord Thurlow decided this. It is true that in some subsequent cases, *Knight* v. *Ellis* (2) was apparently not followed. But in *Ex parte Wynch* (3), decided in the Court of Appeal by Lord Cranworth, C., and Turner and Knight Bruce, L.JJ., *Knight* v. *Ellis* (2) was expressly affirmed and followed, the seemingly contrary decisions being reviewed, and, where they differed from *Knight* v. *Ellis* (2), overruled. The same point was also decided in *Goldney* v. *Crabb* (4), on the authority of *Ex parte Wynch* (3).

In *Ex parte Wynch* (3), Lord Cranworth says, at page 208, "In all these cases the rule applied to real estates derived from principles of tenure has been made the foundation of the rule for construing bequests of personalty, but in all either the technical words, 'heirs of the body' have occurred, or there has been nothing

(1) 1 Rep. 101.
(2) 2 Bro. C. C. 570.
(3) 5 D. G. M. & G. 188.
(4) 19 Beav. 338.

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to show that the words 'issue,' 'children' or the like, have not been intended merely to define or explain the extent of the interest given to the first taker; and I see nothing in these decisions compelling me to hold that where technical words are not used, and where the interest of the first taker is expressly confined to the life estate, I am bound to act in the construction of the bequest of personalty on principles derived from laws of tenure, and not resting on intention. It was on this distinction that Lord Thurlow acted in the case of *Knight* v. *Ellis* (1); there the testator directed certain rents to be accumulated till his grand-nephew should attain his age of twenty-one years, and after that event he gave the interest of that accumulated fund to his grand-nephew for his life, and after his decease he gave the fund to his issue male and in default of such issue to his the testator's three nieces; it was argued that as this would have been an estate tail in real estate, it was an absolute interest in personalty; but Lord Thurlow held otherwise: he gave effect to the manifest intention, not thinking himself fettered by the anology of a real estate, where the result would have been arrived at on principles not founded on intention, but often operating in direct opposition to it. I cannot consider that case as having been overruled. I believe it to have been rightly decided; and at all events if it was wrongly decided, I think it can only be questioned in the House of Lords."

At page 204 he says:—"The authorities I must observe on this subject are very far from satisfactory, and the principles on which they have gone have not, I think, in many cases been such as were strictly applicable to questions of this sort. Rules drawn from principles of tenure have been adopted as canons of construction where tenure is out of the question, though, in the great bulk of the cases the intention has been thereby defeated. Where, however, I find a rule established, I will not question it," and so on. And then at page 213 he says:—"I have been assuming that the case of *Knight* v. *Ellis* (1), if it be good law, governs the present; but I do not forget that this was denied in argument by Mr. Lee. He admitted the authority of *Knight* v.

(1) 2 Bro. C. C. 570.

Ellis (1), but contended that it was a case which did not rule the one now before us. To this, however, I cannot agree. The gift is to Anna Maria Mealy for her life, and the issue from her body lawfully begotten, and it is true that the words, 'and after her decease,' which occur in *Knight* v. *Ellis* (1), are not found here; but I think they are necessarily implied. The meaning is plain, that the legatee shall enjoy the annuity for her life, which means for her life only, and 'then,' which must mean when her life interest is over, that it shall go to the issue. I can discover no sort of distinction between the two cases, nor do I think that there is any distinction arising from the gift here being of an annuity and not of a mere personal fund." Lord Justice Turner agreed with the principle of that decision. Lord Justice Knight Bruce came to the same conclusion as that arrived at by the Lord Chancellor, but on a view of the case that rendered it unnecessary to consider the point discussed by the others.

Thus far I have considered the case as if the words had been male issue only; but they are not. The words are "eldest" male issue. Now, apart from rules of tenure and the cases, no intelligent reader, ignorant of *Roddy* v. *Fitzgerald* (2), could hesitate for one moment in arriving at the conclusion that the nephews were to have life interests only, the property passing over to the eldest son or other male descendant then living of each. Eldest male issue is a peculiar phrase, not occurring, so far as I can find, in any other case except *Lovelace* v. *Lovelace* (3), to which I shall presently refer. "Eldest" naturally implies a comparison of ages as between different persons, and is at least *primâ facie*, referable to a person, and not to a line of descent. Where the words "heir male," or "heir male of the body," occur in such a way as to show that they are used in their proper and legal sense as words of limitation, and not of purchase, the addition of such a qualification as is contained in "first," "next," or the like, will probably not alter the meaning, for these latter words can then only refer to the line of descent.

(1) 2 Bro. C. C. 570. (2) 6 H. L. Cas. 823.
(3) Cro. Eliz. 40

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In *Burley's Case* (1) the words were "next heir male," and in *Miller* v. *Seagrove* (2) the words were "next heir male" (of two persons), and in *Dubber* v. *Trollope* (3), "first heir male of the body." But "next" and "first," in reference to descent, are at most surplusage, and differ entirely from "eldest."

In *Lovelace* v. *Lovelace* (4), the report is a short one, "Waste. The case was J. S. being seized in fee of land, devised it to J. D. and to his *eldest* issue male (he having no son at that time). It was adjudged no estate tail, but for life only; and if he then had a son, it was all one; but a devise to one and his issue male is an estate tail; but here the word *eldest* will not permit that construction."

That was a will of lands, where *primâ facie* issue is a word of inheritance. It was also a case in which there was not, as here, an express estate for life, with a gift to issue on the decease of the first taker. Yet even there the word eldest was held strong enough to oust the more usual construction, and show that the issue was meant to take as *persona designata.*

It is true that the editor of Jarman casts doubts upon the case of *Lovelace* v. *Lovelace* (4). This doubt is founded on the case of *Doe* v. *Garrod* (5). But that case was very different both from *Lovelace* v. *Lovelace* (4) and the present. The testator was disposing, *inter alia*, of copyhold lands, which, by the custom of the manor, descended upon the youngest son. The will provided, "As to my worldly estate I dispose thereof as follows: Item, I give to my nephew Thomas Garrod all my lands etc. to have and to hold during his natural life, and to his son, if he has one, if not, to the eldest son of my nephew James Garrod during his natural life and to his son after him, if he has one, if not, to the regular male heir of the Garrod's family as long as there is one of them in being, and if they should be all extinct, then to the regular heir of my nephew Thomas Field's family." Testator then made a codicil stating that he had received a letter informing him that the wife of Thomas Garrod had been safely delivered of a son, and, that being so, he gave

(1) Cited 1 Vent. 230.
(2) 17 Vin. Ab. Parols H. pl. 4, n.
(3) Amb. 455.
(4) Cro. Eliz. 40.
(5) 2 B. & Ad. 87.

and bequeathed to this son, after his father's death, "all my houses, lands, etc., and to his eldest son if he has one; but if he has no son, then to the next regular male heir of the Garrod's family, as long as there is one of them in being." It was held that the word son must receive a wide construction, and that, having regard to the other phrases in the will, it must include all male descendants; in other words, it must be, from the context, a word of limitation: and, being a word of limitation, it did not lose that character from the use of the word eldest. In a complicated and difficult case this was the result, arrived at not without some doubts. Lord Tenterden, after pointing out the result of the other construction, says that the decision in favour of an estate tail affords "the greatest chance of effecting the general intent of the testator." I am not able to see that that case may not very well stand together with *Lovelace* v. *Lovelace* (1).

Hampson v. *Brandwood* (2) was not the case of a will but of a marriage settlement. The words used were, "first male issue lawfully begottten by the said John Abbs Gorton." There were other indications of intention referred to in the judgment; and, although the settlement was of real estate, the Vice-Chancellor (Sir Thomas Plumer) held that the "first male issue" took as a purchaser. He says (p. 387-8): "It has been argued that the first limitation to the sons was too remote, and therefore bad, and that, consequently, the subsequent limitations were bad—that the words, 'first male issue lawfully begotten by the said John Abbs Gorton, which should attain twenty-one years, and to the heirs and assigns of such male issue,' means male descendants; and that, as the first son might have lived till twenty, and died, leaving a son, who might also have died under twenty, leaving a son, and so on; the estate might have been rendered unalienable beyond the period allowed by law, and *Davenport* v. *Hanbury* (3), *Freeman* v. *Parsley* (4), and *Leigh* v. *Norbury* (5), have been cited, to show that the word issue is construed to mean descendants. It is true that, *prima facie*, the meaning of the word issue, is,

(1) Cro. Eliz. 40.
(2) 1 Madd. 381.
(3) 3 Ves. 257.
(4) 3 Ves. 421.
(5) 13 Ves. 340.

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descendants; but wherever, in a deed or will, the intention appears to be that the word issue was not intended to mean descendants, but children, the Courts give it such a construction; as in *Sibley* v. *Perry* (1), where the word issue was construed children. In the present case, to interpret the word issue to mean descendants, would be to render the deed a mere nullity. A deed, if possible, must be interpreted so as to be effectual—*ut res magis valeat.*" That was in reference to real estate. Of course there would have been no question at all in that case if the settlement had been of personalty.

I am clearly of opinion that in the case before me, so far as the personal estate is concerned, the eldest male issue must be treated as a purchaser; that is that the gifts to the nephews were for life only with executory gifts over on the death of each without issue.

Then the question arises, as to the realty. I have not very full information as to the relative values of the real and personal estate comprised in the will. Plainly the testator had the existence of both classes of property present to his mind. He speaks of rents as well as dividends: and he owned some 40 acres of fee-simple land. There is nothing in the will to show that he thought of one class of property more than another, and it is quite plain that he wanted to keep all in the family and, probably, together (subject, of course, to the initial division into fifths). There are cases in which under a gift of a mixed fund the realty has gone one way and the personalty another. *Jackson* v. *Calvert* (2) is an illustration of this (see the observations of Sir Page Wood, at p. 237, and *Forth* v. *Chapman* (3)). Whether this is a satisfactory result when it is admitted that the word issue is flexible both as applied to real and personal estate, and that by construing it in the same clause in different senses we separate what testator intended to keep together is not exactly the question. *Jackson* v. *Calvert* (2) is not this case where we have not "male issue" only, but "eldest male issue." I cannot but think that when realty and personalty are, as here, blended in one gift, that circumstance should aid the construction as to realty which

(1) 7 Ves. 522. (2) 1 J. & H. 235. (3) 1 P. Wms. at p. 667.

must be placed upon the same word in dealing with personalty. Where there is no other circumstance (as was the case in *Jackson* v. *Calvert* (1), and *Forth* v. *Chapman* (2)) it may be that as to land, issue must be interpreted as heirs of the body. But here as matter of construction, and endeavouring to find what the testafor meant, it is plain that by eldest male issue, he meant a person. I think there is ample ground in the case to hold that the phrase, "eldest male issue" was used in the same sense in reference to both classes of property comprised in the gift, and that in both it meant the eldest son. I do not embarrass the case by considering what would have been the result had there been no sons, but grandsons of the nephews. The question does not arise.

The next question is, What is the meaning of the word "remaining"? In my opinion the "legatees" must mean the five named nephews: and their "eldest male issue" must have the same meaning attached to the phrase as in the preceding line. If so, the gift is to the remaining nephews, or to the eldest male issue of such as had died. The gift to the legatees in this context is not for life (as in the original gifts) but absolute; and it is clear that the accrued shares are not subject to any gift over. The meaning is, I think, that the persons to take under this clause are all the nephews who are left, that is, who survive the one whose share goes over; but if any of the nephews has predeceased him, then his eldest male issue then living is to stand in his place. Thus a nephew who predeceased the one who died would take nothing; but his eldest male issue, if he had left any, would be substituted for him. If, however, he had no male issue, or if having had male issue such male issue had died before the period of distribution, then there would be no accruer in his case, and the share would be divisible amongst the smaller number of takers. The reference to the division every half year appears to strengthen this construction, which I arrive at on the frame of the clauses themselves, and without help from authority.

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(1) 1 J. & H. 235. (2) 1 P. Wms. at p. 667.

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The plaintiff appealed from so much of the judgment as declared that the gift in the will after the decease of each to their eldest male issue respectively of each, meant to the eldest male issue living at the decease of each, and that the plaintiff took nothing as personal representative of her son.

O'Connor, Q.C., *Taylor*, Q.C., and *M'Dermott*, for the appellant:—

"Eldest male issue" means *prima facie* the first born son. The time of vesting ought to be as early as possible: *Emperor* v. *Rolfe* (1), *Farrer* v. *Barker* (2), *Doe* d. *Burrin* v. *Chorlton* (3). The gift is to a *persona designata*, as a purchaser, and not to a class, and it vested at birth. The same meaning must be given to the words in the gift over, as in the original gift: *Bathurst* v. *Errington* (4), *Meredith* v. *Treffry* (5).

There is no case where it is necessary to ascertain who is the eldest son at the date of distribution except for the purpose of determining who are the younger children: *Domvile* v. *Winnington* (6).

Drummond, Q.C., *Wylie*, Q.C., and *Law Smith*, for the respondent:—

"Eldest male issue" means eldest at the time of distribution, and must be ascertained at the death of the tenant for life: *Madden* v. *Ikin* (7). The testator must be taken to refer to some future period, at which some person might, or might not, be alive. We submit that "eldest male issue" does not amount to a *persona designata*, but means the person who answered the description of eldest male descendant at the death of the tenant for life.

LORD ASHBOURNE, C.:—

I have had an opportunity of reading the judgment which Lord Justice Walker has written in this case. I concur in that judgment, and in the reasons given by the Lord Justice.

(1) 1 Ves. Sen. 208.
(2) 9 Ha. 743.
(3) 1 Sc. N. R. 290.
(4) 2 App. Cas. 698, 709.
(5) 12 Ch. D. 170.
(6) 26 Ch. D. 382.
(7) 2 Dr. & Sm. 207.

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WALKER, L.J. :—

By the will of Farrell O'Reilly, the income and rents of his real and personal estate, which are grouped under a gift of all his property, are directed to be divided into five parts, and are given as to the income of one-fifth of each share to his five named nephews, "to be by them enjoyed during the period of their natural lives, and after the decease of each to the eldest male issue respectively of each, and in default of such male issue such share to revert to the remaining legatees or their eldest male issue, to be divided equally every half-yearly term amongst them."

The Master of the Rolls decided, and that decision has not been questioned, that the gift of income and rents is equivalent to a gift of the *corpus*.

The testator died on the 6th November, 1846. One of the five nephews is living and unmarried, three died intestate and unmarried, one in 1845, and the other two about 1850, and the fifth, Farrell Sheridan, died on the 13th December, 1897, leaving a widow, who is his administratrix, and three daughters. He had also issue one son, James Sheridan, who died a minor and unmarried in August, 1870, and to him also administration was taken by his mother.

The questions submitted on the summons are, so far as material—(*a*) Whether the gift after the decease of each to their eldest male issue respectively of each means to the eldest male issue born. To this the answer is, that the gift after the decease of each to their eldest male issue respectively of each means to the eldest male issue living at the decease of each.

(*b*) The next question is whether remaining legatee means surviving legatee, and whether accruing shares went absolutely to such legatee. To this the answer is that the words "remaining legatee" means "surviving legatee," and that accruing shares went absolutely to such legatee. And as regards the rights of Rose Adelaide Sheridan as personal representative of her husband and her son, the answer is that she is entitled as personal representative of her husband to one accrued share of the personalty; and that, as representative of her son, she takes nothing. This last answer is really consequential upon the former ones.

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The main controversy in the present appeal arises upon the first answer above referred to. It is not disputed by the appellant—in fact it is her case—that the gift to the eldest male issue is, as the Master of the Rolls has held it to be, a gift to the eldest son as *persona designata* and as purchaser; but she contends that the logical consequence of the decision of the Master of the Rolls is that the gift was a vested one to her eldest son at his birth, who then acquired a vested interest, and not a gift to that son who happened to be eldest. The respondent contends that the eldest son, in order to take, should have survived his parent.

The decision of the Master of the Rolls on the main question involved in that branch of the will which introduces the question involved in the appeal is, I think, perfectly right, and in fact has not been questioned. A devise to a person for life and after his decease to his issue or male issue would clearly confer an estate tail, and it is now settled that a gift of personalty to a person for life, and after his decease to his issue, would be a gift for life with remainder to his children as a class as purchasers; but the use of the word "eldest" in the gift makes it impossible to apply either of these constructions, and therefore I think the Master of the Rolls rightly held that the gift was in each case to the eldest son as *persona designata*. He sums up his elaborate examination of the authorities by the following conclusions: "Here as a matter of construction, and endeavouring to find what the testator meant, it is plain that by eldest male issue he meant a person. I think there is ample ground in the case to hold that that phrase 'eldest male issue' was used in the same sense in reference to both classes of property comprised in the gift, and that in both it meant the eldest son." The words "such male issue" in the gift over must plainly receive the same construction. This construction, however, must run through the whole gift; and it seems to me that it must be treated as equivalent to a gift to A for life, and after his decease to his eldest son; and in case there shall be no such son, over. The word "eldest" *prima facie* means first in order of birth, and the gift is *prima facie* a vested interest in the eldest son at birth, just as in the familiar instance of a devise to A for life, and after his decease to B.

The idea of the gift being to a class is excluded by the inter-

pretation given to the devise. It is only by a strong context that "eldest son" can be read eldest at the period of distribution. One of these instances is furnished by the case of *Madden* v. *Ikin* (1), where the two eldest children were held to be the two eldest living at the death, by reason of a gift over in case there should be only one child then living; and there are other instances of the same kind, where the context called for such interpretation.

If the argument of the respondent's counsel be correct, I think the son of a deceased eldest son would be excluded. Mr. Wylie contended that though he did not appeal from the order of the Master of the Rolls, and it must be assumed that order was correct, he was entitled to call in aid another suggested construction of the words "male issue," as meaning descendants, or a class of issue; but I do not think that can be done. The interpretation given to the bequest by the Master of the Rolls must be applied all through the will. As regards the gift over to the remaining legatees or their eldest male issue, the decision of the Master of the Rolls has not been questioned, nor could it be, and eldest male issue must bear the same meaning in this clause. The word "or," which involves substitution of the eldest son for the parent, of course implies that the class are to be the surviving legatees; and when one has died before distribution, the surviving legatees and eldest son of the deceased one form the class. I think, therefore, that it is a logical consequence of the decision of the Master of the Rolls on the main question that the eldest son, as *persona designata*, took a vested interest at birth, and therefore that the appeal, which is limited to that point, should succeed.

HOLMES, L. J.:—

Dr. O'Reilly's will, although it has given rise to several questions, is very short.

Having named certain trustees, he gave them all his property of every kind for specified uses and purposes. The first of these was a division of the yearly income into five parts, and a direction that each of his five nephews named in the will should enjoy one

(1) 2 Dr. & Sm. 207.

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of these parts during his life. Thus far no question of construction arises; and instead of setting forth the language of the document, I have stated its admitted effect. Then comes the following clause:—"And after the decease of each to their eldest male issue, respectively of each, and in default of such male issue such share to revert to the remaining legatees, or their eldest male issue to be divided equally every half-yearly term among them." The judgment of the Master of the Rolls upon the hearing of the originating summons has finally settled that the gift of the income of the property in the will amounts to a gift of the *corpus* thereof, that the words "remaining legatees" mean surviving legatees, and that the shares passing under the clause in which these words occur vest absolutely in the persons taking.

Another question raised by the summons was whether the gift "to their eldest male issue, respectively, of each" means to the eldest male issue born. The Master of the Rolls discussed very fully the meaning of the words "eldest male issue"; and he came to the conclusion that they do not indicate a line of descent, but point to an individual—*persona designata*—who is to take as purchaser. The appellant accepts this portion of his judgment, and the respondent does not challenge it. The reasoning seems to me to be conclusive, and I deal with the appeal on this basis, thus reducing the matter in controversy to a very narrow point, which will be best understood by a reference to the events that have happened.

Of the five nephews mentioned in the will, three died nearly forty years ago intestate, and having had no children; and after their deaths, the income of the property was divided between the two remaining or surviving nephews, Farrell Sheridan and Hugh O'Reilly. Farrell Sheridan died in 1897, leaving a widow and three daughters. He had also a son who predeceased him; and the present litigation is between the mother and administratrix of such son, and Hugh O'Reilly the surviving nephew. The former contends that her son at the time of his death had a vested estate in one-fifth of the *corpus* of the property of which his father Farrell Sheridan was tenant for life, and that thereupon Farrell Sheridan, as heir-at-law, and sole next-of-kin of his son, became absolutely entitled thereto. The latter claims that in the event that happened there was default of the eldest male issue of Farrell

Sheridan, and that therefore the gift over took effect. Although it appears in the Rolls order that it was held that "eldest male issue" means eldest male issue living at the death of the tenant for life, and consequently that the defendant succeeded in his contention, I do not find that the point in dispute was expressly dealt with in the judgment delivered in Court. The Master of the Rolls concluded his examination of the authorities bearing upon the construction to be given to "eldest male issue" by saying that these words were used in the same sense in reference to both real and personal estate, and that as to both they meant the eldest son, adding that he did not embarrass the case by considering what would have been the result, had there been no sons, but grandsons. This observation suggests that he was thinking of a son who would outlive his father, but he did not further refer to the question of survivorship, at least in connection with this gift.

Let me now read the clause in accordance with the construction that the words "eldest male issue," and "remaining" have received. It will then run as follows:—"After the death of each nephew to his eldest son, and in default of such eldest son, the share to revert to the surviving legatees, or their eldest sons, to be divided equally amongst them." Could there be much doubt as to the effect of a gift in these words? A devise or bequest to an individual for life, and after his death to his eldest son is very frequent; and I presume that it cannot be questioned that the eldest son would take a vested estate in remainder on the death of the testator, if he were then born; and if not, as soon as he came into existence. The gift to him would not be in any way contingent upon his surviving his father. Nor would the case be different, if the devise to the eldest son were followed by a gift over in default of an eldest son. Where there is nothing to indicate that what is meant is default at a particular time, there can be no default once the son is born; and thus the interpretation of the clause as I have read it would be that the eldest son on his birth takes an absolute and indefeasible estate, and that the gift over only takes effect where there has never been an eldest son, or at least where there has never been an eldest son who survived the testator.

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I do not think that this could be controverted; but the answer of the respondent's counsel would probably be that I am substituting the words "eldest son" for "eldest male issue," and that I have no right to assume that this change would make no difference in construction. It may be argued that the very fact of the testator using the one description rather than the other shows that he desired to make the gift more flexible, and more capable of being adapted to varying circumstances. I confess that I was at first taken with this view, and I called attention to it during the argument; but on further consideration I have come to the conclusion that it cannot be maintained. It involves the fallacy of attributing to the word "issue" when used to describe *persona designata*, a significance which only arises when it is a term of limitation. In the latter case it means a line of descent, the failure of which does not depend upon the birth, or death, of any particular individual. Accordingly, the question must always arise whether the phrase "failure of issue" points to an indefinite failure, or failure at a particular time. But here we start with the proposition that "eldest male issue" describes an individual; and this being so, can it be otherwise interpreted than eldest son?

Of course it is always permissible to show from the language of a will that an eldest son, like any other devisee, taking a gift in remainder, will only become entitled if he is living when the antecedent estate determines. The gift over in the present case is an example of this. Construing "remaining" as "surviving," it appears clear that it is the surviving legatees, or their surviving eldest sons, who are to take; but this result arises from the use of a word which does not occur in the previous part of the clause.

It may be said that the testator thereby shows an intention that the share of a tenant for life is to pass upon his death to persons then living; but a testator's intention upon a matter of this kind is the merest guess work. A man cannot be supposed to have any intention in reference to events which were not present to his mind; and it may be safely said that this testator never realised the possibilities that might result from his will, whatever be the construction that is given to it.

I am not aware that much assistance in determining this

question is to be obtained from authority; but *Madden* v. *Ikin* (1) throws some light on it. This case was referred to on behalf of the defendant in support of his contention; but when properly understood, it is, I think, against him. In it a testator gave personal property upon the death of a survivor of several tenants for life "to be divided equally between the two eldest children born in wedlock of each of his sons and daughters"; and it was held that the two eldest born meant the two actual eldest living at the date of distribution; and the representatives of a deceased eldest, and of a deceased second eldest, were excluded. This seems at first sight to favour the defendant's view; but the decision is explained by the fact that the gift to the two eldest children was followed by a gift over in case there should be only one child *then* living, thus indicating that the testator intended that only children living at the time of distribution were to take. For the foregoing reasons I am of opinion that the appeal ought to be allowed, and the order of the Master of the Rolls altered in the manner asked for by the appellant.

Solicitor for the plaintiff: *Patrick J. Daly.*
Solicitor for the defendants: *Louis C. Smith.*

R. D. M.

(1) 2 Dr. & Sm. 207.

M. R.
1899.
Dec. 16, 20.
1900.
Jan. 12.

THE ATTORNEY-GENERAL *v.* THE MAYOR OF DROGHEDA.

(1898. No. 1201.)

Charity—Annuity payable to Crown for benefit of choir of parish church—Irish Church Act, 1869 (32 *&* 33 *Vict. c.* 42)—*Crown not bound by statute—Application* cy près *with consent of Crown and Court of Chancery.*

King James I., by letters patent, granted lands to the Corporation of the borough of D., subject to the yearly payment for ever of certain salaries to the choir and organist of a parish church within the borough. After the Restoration these salaries, amounting in all to £54 a-year, were paid by the Corporation to the vicar of the parish to enable him to keep a curate, and this application of the money was afterwards sanctioned by the Crown, and by the Court of Chancery in Ireland, and continued to be made down to the year 1895, when the Corporation refused to continue the payment.

An information having been brought by the Attorney-General against the Corporation to enforce payment of the money, it was contended on behalf of the Corporation that by the provisions of the Irish Church Act, 1869 (32 & 33 Vict. c. 42), the annuity payable by the Corporation vested in the Commissioners of Church Temporalities in Ireland, and was now vested in their successors the Irish Land Commission, and that the annuity had been wrongly applied, and that a scheme for its application should be settled by the Court. It was proved that in the year 1870, in assessing the amount of the annuity and commutation money payable to the vicar of the parish under the Irish Church Act, the Commissioners excluded the annuity payable by the Corporation, and that the Irish Land Commission disclaimed any interest in the annuity :—

Held (1), that the annuity payable by the Corporation did not vest in the Commissioners of Church Temporalities, under the Irish Church Act, 1869, but remained payable to the Crown, which was not bound by the statute in this respect, and (2) that the application of the annuity towards payment of a curate had been recognized by the Court as a proper one, and that there was no need to settle a scheme.

TRIAL OF INFORMATION.

The following summary of the facts is taken from the pleadings and the judgment :—

King James I., by letters patent, dated July 14th, 1619,

granted to the mayor, sheriffs, burgesses, and commons of the town and county of the town of Drogheda, certain lands situate within its ambit, and in the county of Louth to hold in free and common socage. The letters patent contained the following provisions:—

"Inasmuch as the aforesaid mayor, sheriffs, burgesses, and commonalty and their predecessors were wont to maintain with the profits and rents of the premises, certain men engaged in divine service in the church of St. Peter within the town aforesaid We also will, and the aforesaid mayor, sheriffs, burgesses, and commonalty of the said town of Drogheda, agree and grant to and with us our heirs and successors, that they the aforesaid mayor, sheriffs, burgesses, and commonalty of the town aforesaid, and their successors for the future shall pay or cause to be paid yearly, for ever, from and out of the premises granted above by these presents, to six singers in English, singing men (beyond and besides the organist and parish clerk, already constituted and established in the said church of Blessed Peter within the said town), and also to three choir boys in English, choristers, to be constituted and established in the said Church of Blessed Peter, the salaries, annuities, or yearly pensions following, viz.:—To every singer, £6 current money of England yearly, and to every boy chorister, four marks current money of England yearly, to be paid yearly for ever."

The said yearly salaries, together with £10 a year to an organist, were constantly paid by the Corporation till a great part of the church of St. Peter was destroyed during the usurpation of Oliver Cromwell. Upon the Restoration of King Charles the Second, the inhabitants of Drogheda not being able to rebuild the said church, they repaired the chancel thereof for divine service to be celebrated therein, but no singing men, boys, or organist were ever appointed after, and a great part of the church became ruinous. From the time of the restoration the Protestant inhabitants increased very much, and it was thought proper by the then Lord Primate that prayers should be read twice every day in the said church, and that two sermons should be preached on Sundays, and the salaries usually given to the said singing men, boys and organist, were, by the advice of

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several Primates of all Ireland for the time being, paid to the vicar of St. Peter's to enable him to keep one or more curates, and the salaries amounting to £54 a year were constantly applied to this purpose, until Primate Lindsay stopped the application in this manner, and commenced a suit in the name of the Attorney-General against the Corporation, to call them to an account for, and oblige them to pay, the said yearly sum of £54, from the time of the restoration of His Majesty King Charles the Second to the time of exhibiting the information, as an arrear due to the Crown.

The Corporation of Drogheda, in February, 1721, petitioned his Grace, Charles Duke of Grafton, then Lord Lieutenant of Ireland, to be admitted to prove that they and their predecessors had actually paid and applied the said yearly sum of £54 in manner before set forth. Dr. Lindsay also preferred his petition in the nature of a cross petition against the relief sought by the said Corporation. Both the petitions were referred to his Majesty's then Attorney- and Solicitor-General for Ireland, who made their report setting forth the several proofs which the said Corporation had made of the application and payment of the said yearly sum of £54 in manner hereinbefore set forth. The report was transmitted to his late Majesty King George the First, who was pleased to refer the whole matter to his then Attorney-General for England (afterwards Lord Raymond), who after hearing counsel for the Archbishop and for the Corporation, reported that his Majesty might command his Attorney-General for Ireland to stop the proceedings in the said information brought in his name, and to dismiss the same and release the said arrears. A release of the said arrears was accordingly granted under the Great Seal of Ireland, dated 16th October, 1725.

The Attorney-General for England, by his report further certified that the application of the said money in the manner aforesaid was very useful and good, but that the direction of the said charity for the time to come falling properly under the cognizance of a Court of Equity, it would be proper to apply to a Court of Equity for a decree for the application of the same for the security and peace of the Corporation.

The Corporation not having paid the said yearly sum of £54 which accrued after the date of the said release, in 1738 the Rev.

Pierce Hughes, vicar of the Church of St. Peter, Drogheda, filed a bill in the High Court of Chancery in Ireland against the Corporation and the Attorney-General, to which answers were put in, and which came to be heard on the 2nd June, 1744, at which hearing it was referred by the Lord Chancellor, Lord Newport, to Dr. Wall, one of the Masters of the Court of Chancery, to state and settle an account of what was due by the Corporation for the said yearly sum of £54 from the time the said Reverend Pierce Hughes became vicar of St. Peter's, Drogheda, and that the said Master should receive proposals for the future application of the said £54 a-year, and should report his opinion to what use it should be most proper to apply the said sum of £54 a-year.

The Master made his report on or about the 6th December, 1744, which was afterwards confirmed, by which he found that there was due by the Corporation the sum of £945 on account of the said sum of £54 a-year, and also reported that the application of the said £54 a-year towards paying the salaries of two curates to assist the vicar of St. Peter's, Drogheda, would be very useful and proper, but no decree or final determination was made in the said cause subsequent to the said report.

On the 9th April, 1745, St. George Caulfield, Attorney-General for his late Majesty, King George the Second, exhibited his information in the High Court of Chancery in Ireland against the Corporation, and against the Rev. Pierce Hughes, setting forth that the Corporation had refused to pay the said £54 a-year, or any part thereof, for the support of the said curate, and had, ever since they were so released as aforesaid by his late Majesty King George the First, detained the same, and claimed that the said annuity might be applied and the arrears thereof accounted for and disposed of as the Court should think proper.

The said Rev. Pierce Hughes having died, the Right Hon. Philip Tisdall, Attorney-General for his late Majesty King George the Third, on the 8th February, 1766, exhibited his information in the High Court of Chancery in the said last-mentioned cause by way of supplement and revivor (after setting forth that the Corporation and the said Pierce Hughes had put in their answers to the information exhibited as aforesaid by the said St. George Caulfield, and that issue had been joined in said cause,

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and several witnesses were examined and several deeds and papers proved, and the death of the Rev. Pierce Hughes, and that said cause came to a hearing before Lord Newport, Lord Chancellor, but his Lordship conceiving he could not make any final order without an express authority from his then Majesty King George the Third, no decree was obtained nor was the said information dismissed), prayed that the report made in the cause between the said Pierce Hughes against the said Corporation and the Attorney-General might stand and be in full force, and that the said suit commenced as aforesaid by the said St. George Caulfield and all proceedings therein might stand revived and be in the same plight and condition they were in at the time of the death of the said Pierce Hughes, and that the said £54 a-year might for the future be applied for the maintenance of a curate to assist the vicar of St. Peter's, or to such other use as the Court should seem proper.

The Corporation by their answer to the said information thereby admitted that they had retained the arrears of the said sum of £54 in their hands, and alleged that they were willing to dispose of the same as the Court should direct.

The said cause came on to be heard on the 13th February, 1770, and it was decreed by the Lord Chancellor of Ireland, that it be referred to one of the Masters to inquire and report the then present yearly value of the lands granted to the Corporation by the Crown, chargeable with the payment of the salaries hereinbefore mentioned, and that the Master should take an account of how much remained due by the Corporation of Drogheda of the said sum of £54 from the time stated in the said report made by Doctor Wall of the 6th December, 1744, and further as therein.

After the said decree the Primate and the Corporation presented a memorial to his Excellency, Simon Earl Harcourt, then Lord Lieutenant of Ireland, praying that his Excellency would move his Majesty to signify his royal pleasure that certain payments therein mentioned might be made out of the arrears; and as to the future application of the said £54, that his Majesty would be graciously pleased to order the same to be applied to found a lecturer and catechist to preach every Sunday in the afternoon in the church of St. Peter's,

and to read prayers twice every other day in the week, and to perform such other duties as the Archbishop of Armagh for the time being should think fit, and that the said lecturer and catechist should from time to time be appointed by the Archbishop of Armagh for the time being.

His Majesty, King George the Third, by letter under his sign manual, dated 4th July, 1744, signified his consent that the said sum of £54, and the arrears thereof due, might by the decree of the Court of Chancery of Ireland, be ordered to be applied to the purposes prayed by the said memorial, and accordingly by an order of the Lord Lieutenant, dated the 9th July, 1774, and directed to the then Attorney-General of Ireland, he, pursuant to his Majesty's said letter, did order that on the hearing of the said cause the Attorney-General should signify his Majesty's consent so expressed.

Abatements having occurred in the said suit, in 1790 proceedings were taken by the then Attorney-General, by way of information against the Corporation, praying that the said yearly sum of £54 and the arrears thereof be applied pursuant to his Majesty's letter, and by a decree of the Lord Chancellor, of May 15, 1794, a reference was directed to one of the Masters of the Court to take an account of the said arrears, and of what payments had been made to the vicar of the parish or to any other person or persons on foot of the said yearly sum of £54 for the maintenance of a curate, lecturer, or catechist, or for any other charitable purpose within the parish. On May 21, 1799, the Master made his report and found that the arrears due from September 19, 1723, to December 25, 1797, amounted to £3996, and this report was confirmed. On July 6, 1799, by decree of the Lord Chancellor, the said report was sent back to the Master, with directions to take an account of the real estate of the Corporation charged with the said yearly sum of £54. During the course of the legal proceedings above mentioned, various persons held the offices of Archbishop of Armagh, and vicar of Saint Peter's, Drogheda, and of curate, lecturer, or catechist in the said parish.

After the pronouncing of the last mentioned decree, the Corporation paid the amount of the arrears found due by the said report, and undertook for the future to pay the annual

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sum of £54, as the same should accrue due. Subsequent to the said decree, the Corporation applied the said sum of £54 in paying the incumbent of Saint Peter's the sum of £43 7*s.* 9*d.* per annum, and applied the residue thereof in paying a salary to the parish clerk of the said church up to the year 1864, and in paying a salary to the sexton of the said church up to the year 1873, and they continued to pay the said sum of £43 7*s.* 9*d.* to the incumbent of the said church, down to the year 1895, when the Rev. John Eccles, the predecessor of the present vicar of Saint Peter's, Drogheda, the Rev. Herbert Sandford, resigned. Since the appointment of the Rev. Herbert Sandford, the present vicar of Saint Peter's, to the incumbency, the Corporation declined to make any payment on account of the said yearly sum, and retained the said yearly sum.

It was alleged in the information, that the said yearly sum of £54 did not vest in the Church Temporalities Commissioners under the Irish Church Act, 1869, and that the Land Commission (to which body the property vested in the Church Temporalities Commission was transferred) had disclaimed all right or interest therein or thereto, but this was disputed by the defendants. The information claimed a declaration that the said yearly sum of £54 was well charged on the lands granted to the defendants by the said letters patent of King James I., an account of arrears, that such arrears and the moneys thereafter accruing should be applied as the Court might direct, and that if necessary a scheme should be settled. The information also prayed for a sale and the appointment of a receiver, and that the above mentioned proceedings in the Court of Chancery might be revived, and that the reference directed by the decree of July 6, 1799, mght be proceeded with.

The Attorney-General (*Right Hon. John Atkinson, Q.C.*), and *Morphy*, in support of the information.

The Right Hon. The Mac Dermot, Q.C., Ronan, Q.C., Miles Kehoe, Q.C., and *M'Cann*, for the defendants.

[The following authorities were referred to—As to the Crown not being bound by statute: *Re Bonham, Ex parte The*

Postmaster-General (1); *Perry* v. *Eames* (2); Hardcastle on Statutes, p. 403; as to settlement of a scheme, *Copinger* v. *Crehane* (3).]

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1900. Jan. 12.

THE MASTER OF THE ROLLS:—

There can be no doubt that the acceptance of the charter by the Corporation rendered it liable to fulfil the condition on which it was made; and the stipulated annual payment became, I think, a rentcharge issuing out of the property. It is also declared to have priority over all other rents, &c., affecting the premises. [The Master of the Rolls here read the paragraphs of the information which have been summarized above, and were expressly admitted in the defence.]

By the defence the defendants rely mainly upon a charter of William III., which granted to them certain lands and premises including (it is stated) the lands in James' charter, at a rent of £47 18*s*. 7½*d*., which they state to have been in substitution for the salaries and other moneys payable under the charter of James. It appears, too, that the Corporation purchased and extinguished this rent of £47, odd, in the year 1858, in a proceeding in the Incumbered Estates Court. The plaintiffs reply, denying the allegation and contending that the defendants are estopped from relying on this defence by the proceedings and decrees in the statement of claim set out. At the bar, however, The Mac Dermot, in reply, expressly gave up this defence, and admitted that the money was payable to somebody and for some purpose, the only question being to whom and for what purpose. The annuity under the patent of James has priority; and it is not shown that the lands are identical.

The first question, then, which I have to decide is, whether the annual payment ought to be made to the Land Commission. The defendants say it ought. The following are the facts:—In January, 1870, the Rev. John Eccles, incumbent of St. Peter's, applied to the Commissioners of Church Temporalities to fix the amount of the annuity to which he was entitled under the Church Act; and in the statement of his income returned as one of its

(1) 10 Ch. D. 595. (2) [1891] 1 Ch. 658. (3) Ir. R. 11 Eq. 429.

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constituent parts £43 7*s.* 9*d.* from the Drogheda Corporation. In assessing the income this was not included, and by order of the 23rd July, 1870, signed by the late Mr. Justice Lawson, the annuity was ascertained, subject to appeal, to be £309 5*s.* 4*d.* which, admittedly, does not include anything on foot of this payment by the Corporation. Again, in 1871, Mr. Eccles applied to commute his annuity; and repeated his claim in respect of his annual payment from the Corporation. Again the claim was rejected, on the ground, appearing on the face of the proceedings, that it was "not vested: see report of solicitor." That report has not been produced, and it is stated that it cannot be procured.

Now, these are decisions of a Court; "judicial proceedings before a Court of Record" (32 & 33 Vict. c. 42, s. 7), and the subject-matter was clearly within its jurisdiction. But the Corporation of Drogheda was not, so far as appears, party or privy, and could not be prejudiced by them. Still they constitute an adjudication that, whoever else was entitled to the annuity, it did not vest in the Church Temporalities Commissioners. The grounds of the decision do not appear; and it is therefore impossible to say with certainty whether Mr. Morphy is right in his suggestion that it was because the Crown was not bound in respect to this particular annual payment. It is clear, however, that the Commissioners did not purport to release or extinguish it; and that if they had done so, they would have been acting without jurisdiction. Indeed it was not contended or pleaded that they had done anything of the sort. The contention was that, notwithstanding the proceedings of 1870 and 1871, the annuity was and is payable to the Irish Land Commission, representing the Church Temporalities Commissioners; and that, in spite of the distinct repudiation by the Land Commission in 1897, it is still their property.

I refer to two letters on that subject, one dated 26th February, 1897, from Mr. Thomas Greene, Secretary of the Church Representative Body, to Rev. Herbert Sandford:—

"DEAR SIR,—In reply to your enquiry, I am directed to inform you that on the 4th of June, 1872, the Rev. John Eccles commuted his annuity of £444 18*s.* 8*d.*

"I have examined the original application for his annuity made by Mr. Eccles to the late Commissioners of Church Temporalities. I have also examined

the order made thereon by the same Commissioners, and find that the question of including in Mr. Eccles's annuity the particular item to which you refer, namely, the annual payment of some £43 odd by the Corporation of Drogheda, was considered by the late Commissioners, and that they decided not to include same in the amount of the annuity to be declared by their order, as they were of opinion that the provisions of the Irish Church Act (1869) were inapplicable to any dealing, on their part, with the payment of that annual sum of £43 odd."

The next letter is from Mr. J. H. Franks, Secretary of the Irish Land Commission, dated 5th March, 1897:—

"SIR,—I am directed by the Irish Land Commissioners to acknowledge the receipt of your communication, dated the 4th inst., who state, that having enquired into the circumstances of the case, they have ascertained that the Rev. Mr. Eccles, when furnishing his claim for an annuity under the 14th section of the Irish Church Act, 1869, included the stipend of £43 7*s.* 9*d.*, payable by the Corporation of Drogheda, but Judge Lawson disallowed this item from his claim. Subsequently, when applying to commute his life interest, Mr. Eccles again made a claim in respect of the stipend payable by the Corporation of Drogheda, and the matter having been again fully considered, it was ruled that the stipend did not vest in Church Temporalities Commissioners under the provisions of the Irish Church Act, 1869, and was still payable direct to the Rector of St. Peter's, Drogheda; under the circumstances the Commissioners do not intend to make any claim to the Corporation of Drogheda in respect of this stipend."

After all these proceedings, it would manifestly be impossible for the Land Commission to claim the annuity; and assuming that the annuity is payable, and if paid to anyone whatever is applicable to the service of the Church of St. Peter's as claimed by the Attorney-General, the Land Commission, even if not technically bound (as I think it is) by the judicial acts of the Church Temporalities Commissioners, and by its own formal statements intended to be acted upon, could never succeed in an attempt to interfere with by-gone payments or arrears at any rate.

On the question, supposing it to be open, whether the annuity did or did not vest in the Church Temporalities Commissioners, I think the decision of Judge Lawson was correct.

It is certain that even though the Crown be expressly mentioned in an Act of Parliament, so as to be in some particulars bound by

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it, it may not be bound by all its provisions. There may be enactments which do not mention the Crown; and, if they are separate from those which do, the Crown will not be bound by them. A very good illustration of this is afforded by *Perry* v. *Eames* (1), where it was held that the Crown is not bound by sect. 3 of the Prescription Act (2 & 3 Wm. 4, c. 71), though it would have been bound, if sect. 2 had applied.

Now in the section of the Irish Church Act which vests church property in the Commissioners (sect. 12) the Crown is not named, and if the annuity in question be "property," which includes choses in action, belonging to a "benefice," the question is, whether in any other part of the Act the Crown is named in such a way as to bind it, and so vest the annuity. The preamble recites:—

"And whereas Her Majesty has been graciously pleased to signify that she has placed at the disposal of Parliament her interest in the several archbishoprics, bishoprics, *benefices*, cathedral preferments, and other ecclesiastical dignities and offices in Ireland."

This is relied on as showing that the annuity in question must be dealt with exactly as if it had been reserved in favour of a private person. But what the Crown intends to surrender is its "interest" in certain ecclesiastical offices, and no doubt rights of nomination and presentation were referred to. An annuity for singing men or lecturers is not an interest in a benefice. It belongs to the benefice in one sense so far as interest is concerned, but is vested in the Crown as a trustee, and is, I think, not within the words of the preamble. If so, it still remains in the Crown as trustee. Nothing is to be presumed against the right of the Crown by way of intendment, and indeed I cannot understand why the Corporation of Drogheda has thought it right to raise this defence, after the decisions by the Church Commissioners, never appealed from, that the annuity did not vest in them, and after the considered and specific statement in writing by the Irish Land Commission that they had no concern with it.

The other defence with which I have already dealt, viz. that

(1) [1891] 1 Ch. 658.

there were not two annuities but only one, would have had substance in it, if it had been true, but it was not; and so was abandoned. This defence has no merits and no substance: for if it were successful the corporation would still have to pay the money, and it would have to be in some way preserved for the Church of St. Peter.

There remains the only other question, viz.:—If the Corporation are liable to pay, what is to be done with the money when paid? This is in one way an important matter; for the Corporation insists that it has been misapplied ever since the time of the Commonwealth, and that a scheme should now be settled (assuming the other defences to fail), not for the benefit of the church of St. Peter, but "for purposes beneficial to the whole borough of Drogheda."

There can be no doubt but that the intention of the King as shown by Letters Patent, 16 Jac. I., was that the annuity payable by the Corporation was to be applied in defraying the salaries of singing men and boys, &c. This, however, was not in the main for the benefit of the singing men themselves, but for the improvement and proper celebration of divine service in St. Peter's. Thus, when after the Restoration it was not possible to apply the money towards the maintenance of an efficient choir suited to a large church, the church itself having been in great part demolished, the application of it towards the salary of a curate, though not strictly within the terms of the charter, was yet a very admirable application of it *cy près*. No doubt such an application is not one which it is safe for a trustee to make without the sanction of a Court; and no previous sanction would seem to have been obtained. The Crown, however, was itself the visitor of this charity, and expressly consented to the change, which was recognised and affirmed in suit after suit by Chancellor after Chancellor down to the 6th July, 1799. The annuity has been paid ever since that date, or rather was paid till 1895, when the then incumbent, Rev. John Eccles, resigned. Since then it has stopped; and the present suit is the necessary consequence. It is utterly impossible to hold that all that has been done for upwards of 230 years to the knowledge and with the consent of the Crown as founder of the charity and as its visitor, done, too, under the sanction of repeated decrees of the

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highest Court in this realm, acquiesced in and acted on by the Corporation of Drogheda, and all the community, is wholly invalid and wrong. If the Court had been applied to, to frame a scheme in express words, the present is the very scheme it would have framed, going, as it does, to the substance of the matter, by helping to provide for the due celebration of divine service in the church of St. Peter's in the mode most needed, and indeed the only possible way. If it were necessary to have recourse to it, the facts of the case would raise a strong case of presumption—presumption of any and every fact, consent, or document—nay, even an Act of Parliament, needed to validate so long a user. But I do not think it is necessary to resort to that doctrine. I am bound by what has been decided and decreed; and this is *causa judicata.*

Solicitor for the Attorney-General: *Sir Patrick Coll.*
Solicitor for the defendants: *M'Cann.*

W. L.

HUSSEY *v.* DOMVILE.

V.-C. 1899. April 28, 29. June 8.

Appeal. 1900. Feb. 8, 12, 27.

Landlord and tenant—Lease—Covenant by landlord to renew within a limited period on tenant nominating new life within a specified time—Time the essence of the contract—Tenantry Act (19 & 20 *Geo.* 3, *c.* 30)*—Distinction between relief given by equity in case of neglect to renew where the covenant to renew is perpetual and where it is temporary—Tenant for life of reversion accepting a fine from the lessee nominating a new life after the specified period had expired—How far binding on the inheritance.*

A lease for three lives contained a covenant by the lessor to renew the same by adding a new life on the death of any of the *cestui que vies* during a period of ninety years on the lessee nominating the life so to be added within six months from the death of *cestui que vie* in whose place the new life was to be inserted, and on paying a fine of five shillings. On the fall of one of the lives the lessee allowed more than six months to elapse before nominating a new life. The delay was not due to any unavoidable accident, excusable ignorance, fraud or surprise, but arose from mere neglect on the part of the lessee:—

Held, by the Court of Appeal (reversing the judgment of the Vice-Chancellor), that in the case of such covenants time was of the essence of the contract, that the Tenantry Act did not apply to covenants to renew during a limited period, that there was no equity to relieve the lessee from his own neglect, and that therefore he could not compel the lessor to execute a renewal for the life so nominated.

On the fall of another life in the same lease the lessee had nominated a new life after the period of six months had elapsed, the delay being due to the lessee's own neglect. Notice of this nomination was given to a person who was then equitable tenant for life of the reversion, no notice being given to the trustees in whom the legal estate was vested. The tenant for life accepted the nomination, and also the fine payable on the occasion:—

Held, by the Court of Appeal (reversing the judgment of the Vice-Chancellor), that the act of the tenant for life did not bind the inheritance, and that the new life was not validly nominated.

Quære: Whether when a lease for lives contains a covenant by the lessor to renew on the dropping of each life successively, the lessor is bound to renew where more than one life has dropped, as to one of which the right to renew has been lost by lapse of time.

ACTION claiming a declaration that the plaintiffs were entitled to a renewal of a certain indenture of lease dated the 1st August, 1900—VOL. I. 2 L

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1823, and made between Sir Compton Domvile, Bart., of the one part, and William Sherrard of the other part, of the lands of Kilbogget, in the county of Dublin, pursuant to the covenant and provisions therein, and in an indenture dated the 29th March, 1842, made between the said Sir Compton Domvile of the first part, Compton Charles Domvile of the second part, and William Sherrard of the third part, contained; and that the defendants should be ordered to execute such renewal to the plaintiffs for the lives nominated in a notice, dated the 31st January, 1898, or for such other lives as the Court shall think proper, the plaintiffs offering to pay to the defendants all sums due for fines and interest.

The plaintiffs, M. F. Hussey and J. Sherrard, were the trustees of a marriage settlement, whereby the lessee's interest in the lease was settled, and also an infant, James Ormsby Sherrard, who under the trusts of the settlement was absolutely entitled to the lands held under the lease. The defendants were Compton Edward Domvile and G. H. Major, the trustees of the will of Compton Charles Domvile, and also H. W. Domvile, the tenant for life of the reversion of the lands comprised in the said lease under the trusts of the said will.

By the lease of the 1st August, 1823, Sir Compton Domvile demised to William Sherrard, the lands of Kilbogget, to hold the same unto the said William Sherrard, his heirs, and assigns, for the lives and life of His Royal Highness Adolphus Frederick, Duke of Cambridge, David Henry Sherrard, and William Nassau Sherrard, and of the survivors and survivor of them, and for and during the lives and life of all and every such other persons and person as by virtue of the covenant for renewal thereinafter contained should from time to time successively be added thereto during the term of years in the said covenant mentioned, subject to the yearly rent of £405 of the then currency of Ireland, with one shilling in the pound for receiver's fees, and to the covenants by the lessee and conditions therein contained; and the said Sir Compton Domvile thereby for himself, his heirs and assigns covenanted with the said William Sherrard, his heirs and assigns, that upon the death of the aforesaid lives or life, or any of them, which should first happen within the term of seventy years to be com-

puted from the 1st May, 1823, and he, the said William Sherrard, his heirs or assigns first paying unto the said Sir Compton Domvile, his heirs or assigns, the sum of five shillings, and upon the nomination of the life of any other person within six months next after the death of such person or persons as aforesaid, by the said William Sherrard, his heirs or assigns, at his or their own request, to be put and inserted in the place and stead of the person so happening to die as aforesaid, which life so added and inserted was to be endorsed on the said lease, or to be written in a deed, label, or parchment to be affixed to the said lease, or in a separate deed or writing, declaring the life so failing, and the life so to be added in lieu thereof, and the three lives in being, during which the said estate should be then to continue, and in like manner from time to time successively thereafter—during the said term of seventy years, commencing as aforesaid—upon the failure of every other life in the said lease then nominated, and thereafter to be successively nominated as aforesaid, and upon the like nomination of any other life successively in lieu of every several life so failing as aforesaid, that then the said Sir Compton Domvile, his heirs and assigns, upon the demand of the said William Sherrard, his heirs and assigns, upon the like payment of five shillings for the fall of every such life at the time of such demand to be made as aforesaid, would successively thereafter, during the term aforesaid, add and insert to the term of the said lease the several life or lives of the several person or persons so successively nominated in place of the several person or persons so successively happening to die as aforesaid, which several lives so to be added should be endorsed on the said lease, or written in the manner therein mentioned.

By an indenture dated the 29th March, 1842, and made between Sir Compton Domvile of the first part, Compton Charles Domvile of the second part, and the said William Sherrard of the third part, the said Sir Compton Domvile, and Compton Charles Domvile covenanted with the said William Sherrard that the interest of the said William Sherrard in the said lands under the said lease should be, and was thereby, extended, by making the said term of seventy years, during which the said lease should be renewable, commence as from the 29th March, 1842.

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By an indenture dated the 2nd January, 1852, and expressed to be made between the said Sir Compton Domvile of the first part, the said Compton Charles Domvile of the second part, and Maria Sherrard (in whom the interest of the lessee under the said lease was then vested as tenant for her life) of the third part, the said Sir Compton Domvile and Compton Charles Domvile added the life of Her Most Gracious Majesty Queen Victoria, in place of his Royal Highness Adolphus Frederick, Duke of Cambridge, who who died on July 8, 1850, and by the same indenture the said Sir Compton Domvile and Compton Charles Domvile granted the lands and premises to the said Maria Sherrard, her heirs and assigns, for the lives and life of the said David Henry Sherrard, William Nassau Sherrard, and Queen Victoria, and of the survivors and survivor of them, and for the life and lives of all such other person and persons as should be added to the same term during the said period of seventy years, from the 29th March, 1842, subject to the rent then payable under the said lease, and to the covenants by the lessee and conditions therein contained: and in the said indenture was contained a covenant for renewal by the said Sir Compton Domvile and Compton Charles Domvile, similar to that contained in the said lease of the 1st August, 1823. This last-mentioned deed was not executed by Compton Charles Domvile, who was entitled to the reversion of the said lands expectant on the death of Sir Compton Domvile, who was tenant thereof for his life.

David Henry Sherrard died the 7th May, 1868. On the 1st of April, 1871, James Ormsby Sherrard (who was then absolutely entitled to the lands under the lease) served on Mrs. Isabella Maria Malton (who was then equitable tenant for life of the reversion) a notice nominating Judge Warren as a life in place of David Henry Sherrard, and paid to Mrs. Malton and the trustees of her settlement a renewal fine of 4*s.* 7½*d.* which was duly accepted (a formal receipt being given), but no deed, label, or parchment was executed inserting Judge Warren's life in the lease. The notice nominating Judge Warren was not served on the then trustees of the will of Compton Charles Domvile by which a life estate in the reversion was devised to his widow, who afterwards became Mrs. Malton, and settled this life estate upon her second marriage.

William Nassau Sherrard died on the 22nd February, 1879. Judge Warren died on the 24th September, 1897.

On the 8th February, 1898, the plaintiffs M. F. Hussey, and Jacob Sherrard, caused the defendants to be served with a notice in writing, naming the life of the Princess Alexandra Louisa Olga, daughter of His Royal Highness Alfred Ernest Albert, Duke of Saxe Coburg and Gotha, and Duke of Edinburgh, in the place of the said William Nassau Sherrard, and the life of the Princess Victoria, daughter of His Royal Highness the Duke of York, in place of the said Right Hon. R. R. Warren, to be added to the term of the said lease, and tendered to the defendants the renewal fines payable on the fall of the said lives respectively, amounting together to the sum 9*s.* 3*d.* with interest thereon. The defendants refused to accept the sum so tendered, or to renew the lease for the lives so nominated, or for either of them.

No notice requiring the plaintiffs to nominate lives in place of William Nassau Sherrard and Judge Warren was ever served by the defendants, nor was any demand made by them for renewal fines upon the fall of the said lives or either of them, and the rent of the premises was paid and accepted up to the last gale before the commencement of the action.

The defendants pleaded that the life of Her Majesty Queen Victoria was not nominated within six months after the death of His Royal Highness Adolphus Frederick, Duke of Cambridge, as the life to be put and inserted in the place of the said Duke of Cambridge.

The defendants by their defence further submitted that it having been omitted or neglected to nominate a life to be added to the term of the said lease in place of William Nassau Sherrard, within six months next after his death, the plaintiffs were not now entitled to do so: and further that the life of Judge Warren having never been validly nominated or added to the term of the said lease, the plaintiffs were not now entitled to nominate a life to be added to the term of the lease in his place.

At the trial of the action the facts above stated were proved. Evidence was also given that the lessee and those claiming under him had from time to time expended considerable sums in improvements on the demised premises, and this fact was also mentioned in some of the deeds above stated.

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No excuse was offered for the *laches* of the persons entitled to the lessee's interest for the time being in failing to nominate new lives on the dropping of the lives in the lease. No case of mistake, fraud, or inevitable accident was attempted to be made, and it is to be taken that the omission to nominate new lives on the occasion of the death of David Henry Sherrard and William Nassau Sherrard, within six months of their respective deaths, arose from mere neglect on the part of those entitled to the lessee's interest.

No evidence was offered on either side as to the date of the nomination of the life of Her Majesty the Queen.

Serjeant Campion, Q.C., Matheson, Q.C., and *Walker,* for the plaintiffs.

Twigg, Q.C., O'Connor, Q.C., and *J. R. Orpen,* for the defendants.

The arguments are fully given in the report of the case in the Court of Appeal.

June 8.

THE VICE-CHANCELLOR:—

The question in this case is whether mere neglect by the lessee to nominate new lives, and to pay or tender the renewal fines within the prescribed period is sufficient to disentitle him to the relief which this Court on its general principles affords in cases of forfeiture. There is no evidence whatever of fraud on the part of the lessee, and indeed no such case was relied on.

There was no injury sustained by the lessor, for the fine was merely nominal, and no case has been made for any substantial compensation: and any trifling loss by the non-payment, say every seven years in analogy to septennial fines, would with interest amount to a mere trifle, and whatever it may be, the lessees are ready and offer to pay it.

There are two cases in which neglect can be said to have occurred, one being that of the death of David H. Sherrard, who died on the 7th May, 1868, and the nomination of the late Judge Warren in his place, which took place on the 1st April, 1871; and the other, that of the death of William N. Sherrard, who died on the 22nd of February, 1879, and the nomination of the

two lives, on the 8th February, 1898, in the places of him and Judge Warren. Another case was put forward in the defence, namely, the death of the Duke of Cambridge, and the nomination of Her Majesty the Queen, on the 2nd January, 1852, but the laches, if any, in that case appear to me to have been waived by the then immediate owner of the reversion, who though he may have been only tenant for life, as is alleged, appears to have accepted the small sum then due for the fine and interest thereon, and executed a formal renewal of the lease. It is alleged that Compton Charles Domvile, the remainderman, who was made a party to the renewal, did not execute it, but even if he did not, there cannot be much doubt that he was aware of its execution, and in my opinion those who have succeeded him, cannot now, after the lapse of nearly twenty years since the death of the last of the original *cestui que vies*, be entitled to rely on any laches in this respect. There was certainly in this instance no gross neglect on the part of the lessee, who did all that was required on his part, by nominating the life and paying the fine and interest.

I shall therefore treat the other two cases I have mentioned as those only which require consideration.

It is plain upon the dates to which I have referred, that the conditions upon which the lessor in the lease of 1823 covenanted to renew that lease, have not in these cases been complied with, and that at law, the right of renewal has been forfeited through the neglect of the lessees to renew from time to time within six months from the death of each *cestui que vie*.

The plaintiffs therefore sue for relief against this forfeiture, offering to pay to the lessor any compensation the Court may award for any loss or injury which he may have so sustained.

The defendants insist that this Court cannot interfere with their legal rights, and that these have become absolute by the non-compliance of the lessees with the condition upon which the lessor covenanted to renew.

It is of course necessary to inquire whether the case comes within the provisions of the Tenantry Act, for if it does *cadit questio*. That enactment in its terms, deals only with cases of covenants for perpetual renewal of leases for lives. It recites that great parts of the lands in Ireland are held under leases for

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lives with covenants for perpetual renewal upon payment of certain fines, at the times therein respectively mentioned for each renewal, and that such tenants have frequently neglected to pay or tender such fines within the times prescribed by such covenants after the fall of such lives respectively, and that many such leases are settled to make provision for families and creditors. So far, the word "such" wherever it occurs, must in strict grammatical construction be held to apply only to leases for lives with covenants for perpetual renewal. Passing over for the present the important declaratory words that follow, it states that the end or object of the Act, is that such interests may not be defeated by a mere neglect, where no fraud appears to have been intended, upon making full satisfaction to the lessors. It then proceeds to enact that Courts of Equity, upon an adequate compensation being made, shall relieve such tenants against such lapse of time, if no circumstance of fraud be proved against such tenants, unless it be proved that the landlords or lessors, or persons to receive such fines, had demanded such fines from such tenants, and that the same had been refused, or neglected to be paid within a reasonable time after such demand. Here again the word "such" in like grammatical construction, refers back to leases for lives with covenants for perpetual renewal.

The Act has not however received such a strict construction, or at least has not been restricted in its application to cases within its letter. Being a remedial Act, it may be acted upon in cases which may be fairly considered within what in such cases is termed the equity of it, that is cases where a similar injustice exists, to which a similar equitable consideration should, in order to prevent a like wrong, be afforded by a Court of Equity.

It has accordingly been held that leases in which no renewal fines were payable came within the equity of the Act. And in cases to which the present more nearly approaches, it was held in *Boyle* v. *Lysaght* (1) and other cases, that leases for years determinable on lives with covenants for perpetual renewal were within the Act. It was held by me in *M'Dermott* v. *Caldwell* (2), that a lease for twenty years renewable at any time or times within 1000 years, was within the equity of the statute.

(1) Vern. & Scri. 135. (2) I. R. 10 Eq. 504.

In this I followed what I consider was the principle on which those cases were decided, namely, that though it did not come within the terms of the Act, it was within its equity, as I was of opinion that a covenant to renew every twenty years, during a long term of 1000 years, was analogous to a covenant for renewal on the death of a life or lives for ever. It has been laid down, perhaps too broadly, that the covenant in such cases must be one for perpetual renewal. I am of opinion that, for the reasons I have stated, founded on the language of the Tenantry Act, this proposition is correct, and that the statute in terms applies only to leases with covenants for perpetual renewal, but I do not hold that leases perpetually renewable for terms of years, or even for a limited term of years, are not within *the equity* of the Act. I think that this case may be decided without laying down a rule upon the subject, because there is another and a wider principle of equity, which in my opinion applies to it, that is the general doctrine of this Court as to giving relief against forfeitures. It is true that in England there is perhaps a narrower and stricter measure of relief than has prevailed in this country, where there was always a local equity, as it was termed, more favourable to the lessee. The rule in this country, at least, appears to me to be that this Court will interfere to prevent the taking advantage of a forfeiture in cases of mere neglect where there has been no fraud or unfair dealing on the part of the lessee, where compensation for any loss or injury sustained by the lessor can be made by the lessee, and especially where time is not of the essence of the contract. I say, "mere neglect," as in the case of what is termed gross neglect, even in the absence of fraud or unfair dealing, the Court may refuse relief. But to establish a case of gross neglect, there must be something more than a mere omission; something, for instance, that has called the attention of the lessee to his neglect, but without effect. Perhaps even a very protracted neglect might without more be deemed gross, but this has not been so held in this country so far as I am aware. In the present case there is nothing but mere neglect, mere carelessness on the part of the lessee, no intention shown to take advantage of his lessor. If there were not equal carelessness on the part of the lessor, or an intention to take

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advantage of the lessee, which I cannot suppose, it would have been easy for the lessor to call the attention of the lessee to the delay, though he was not under any legal obligation to do so.

Although the Tenantry Act may not apply in its terms, or perhaps in its equity, the declaration it contains as to the received opinion in the kingdom that Courts of Equity would relieve against lapse of time upon giving compensation, and its expressed end being that the interests then dealt with should not be defeated by mere neglect, is of importance even in a case like the present, as it declares the law of this Court as to cases of forfeiture in conformity with the principles laid down by Lord Redesdale which are not confined to contracts for the renewal of leases.

In the next place, I am of opinion that here time is not of the essence of the contract even though there is a limit to the period for renewal. Of course where the contract is for perpetual renewal it is immaterial to the lessor how long the lessee puts off naming new lives, as all the lessor can get are the renewal fines and interest, and these are regulated by the system of septennial fines.

There is of course room for argument that the same view does not apply to a covenant limited to a term of years. But the substance of the contract is that the lessee shall have practically ninety years certain *plus* his chance of the duration of three lives nominated within the term. He has the whole term to nominate new lives as the existing or the substituted lives fall.

The question of time arises in two distinct ways—first, as to the term within which alone the right to nominate new lives exists; the other the time from the death of each *cestui que vie* within which the nomination was intended to be made. These seem to me to be open to very different considerations. The former is clearly of the essence of the contract, for the intention of the parties when contracting was that the prescribed term was to be the measure of what the lessor was to grant and the lessee to receive, namely, a fixed period at first of seventy years, afterwards extended by a new contract to ninety years, and in addition the lives of the three persons who should happen to be the *cestui que vies* living when the prescribed time expired. That was beyond doubt an essential part of the contract, and could not be altered by either party by conduct, nor otherwise than by an

express new contract. The other seems to be of a totally different nature; it was applicable merely to the mode of substituting new lives for such as should fall from time to time during the prescribed term. It was necessarily a matter of the merest chance how this would affect the interest of either party. If immediately on the fall of each life, a new one was nominated, that life so nominated might again fall at any time, and thereupon so long as the prescribed term lasted the lessee could nominate another; a similar chance would exist as to the life of the new *cestui que vie*, and so on from time to time while the prescribed term lasted. I do not think it could be reasonably supposed that mere delay, not gross delay so called, without premeditation of gaining an unfair advantage in a case clear of fraud, could have been contemplated as making the time for nominating a new life an essential element of the contract. No doubt the words of the covenant are "upon the nomination of any other person within six months next after the death of such person or persons as aforesaid by the lessee, &c., that then the lessor, &c., should at any time during the said term on the demand of the lessee, &c., add and insert to the time and term of this lease the life of such person so nominated in the place and stead of the person so happening to die."

The language of the covenant itself seems to show that this period of six months was not essential to the contract. There are no negative words used which is a matter to be considered, although even if there were such words they would not necessarily prevent the interference of the Court. Delay in nominating a new life might operate to the prejudice of the lessee, as it might possibly exist till the prescribed term expired, in which case his right of nomination would fail.

In the present case there are more than twenty years of the term still to run during which the right of nomination would continue. I am of opinion that, as to this period of six months for nominating new lives, time is not of the essence of the contract.

The next question is whether this is a case where the lessor has a claim to compensation, and whether such compensation can be made. Except the payment of the nominal fine of 5*s*. Irish on the fall of each life and interest on such fines I cannot see what injury the lessor has sustained by the delay. It was contended that the

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lessee might postpone the nomination of new lives with the design of thereby nominating persons who would be younger at the expiration of the term than if he made the nomination earlier. But this seems to me rather a far-fetched idea, and in my opinion speculations of this kind are too uncertain and remote to be taken into account. It would be impossible to say how such compensation could be estimated, and I do not think that the claim to it rests upon any solid basis. It is not like compensation for the loss of renewal fines, which in cases of leases for years renewable for years can be calculated, or in cases of leases for lives renewable for lives may be ascertained in the established method of septennial fines. If the case required it, I see no impossibility in applying the principle of septennial fines to a lease for lives renewable for a limited period, as if each life had died at the end of seven years, and charging the lessee with a fine as if there had been a renewal.

I am therefore of opinion on a full consideration of the whole case that the plaintiffs are entitled to the relief prayed. There must be an account at Chambers, if the parties cannot agree on the amount, of the sum due by the plaintiffs for renewal fines and interest, and in taking this account let the rule as to septennial fines be applied where necessary.

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Feb. 8, 12, 27.

The defendants appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes L.JJ.).

Ronan, Q.C. and *O'Connor, Q.C.* (with them *J. R. Orpen*), for the appellants:—

The plaintiff's right (if any) arises under a covenant for renewal during a fixed term, not a covenant for perpetual renewal: the lessor covenanted to renew if the lessee applied within six months from the dropping of a life: the lessee claims that he can compel the lessor to renew, though he has lain by without making any application of renewal for nearly twenty years since the death on which his right to a renewal accrued. No explanation is offered for the delay. There is no equity to compel the lessor to renew

in such a case: *Allen* v. *Hilton* (1); *Baynham* v. *Guy's Hospital* (2); *Bayley* v. *Corporation of Leominster* (3); Fry on Specific Performance, 3rd Edition, p. 503; Foa on Landlord and Tenant, p. 227. In all cases where the contract is unilateral, creating an option or privilege in favour of one of the contracting parties, strict compliance with the terms of the contract as to time is required: *Eaton* v. *Lyon* (4); *Lord Ranelagh* v. *Melton* (5); *Barrell* v. *Sabine* (6); *Davis* v. *Thomas* (7). The nomination of the new life within six months of the death of the old one is a condition precedent to the renewal: *Job* v. *Banister* (8); *Finch* v. *Underwood* (9); *Bastin* v. *Bidwell* (10); *Nicholson* v. *Smith* (11).

The plaintiff in such a case must show he is entitled to specific performance of the agreement contained in the covenant. The principles in relation to relief against a forfeiture do not apply. In the Vice-Chancellor's Court it was argued on behalf of the plaintiffs that they were entitled to relief—1, under the Tenantry Act, 19 & 20 Geo. 3, c. 30; 2, under the equity of that statute; 3, under the old local equity, which was wider than the statute or its equity.

1. The reason for the passing of the Tenantry Act appears in its *exordium*, and also in the judgment of Lord Lifford in *Boyle* v. *Lysaght* (12). The Act recites that "great parts of the lands of this kingdom are held under leases for lives *with covenants for perpetual renewals* upon payment of certain fines at the times therein respectively mentioned for each renewal"; that "*such* tenants and those deriving under them have frequently neglected to pay or tender such fines within the times prescribed"; that "many *such* leases are settled to make provision for families"; that "it has been for a long time a received opinion in this kingdom, to which some decisions in Courts of Equity and declarations of Judges have given countenance, that Courts of Equity would in such cases relieve against lapse of time." After these recitals the Statute enacts

(1) 1 Fonbl. Treat. Eq. 432, n.
(2) 3 Ves. 295.
(3) 1 Ves. 476.
(4) 3 Ves. 689.
(5) 2 Dr. & Sm. 278.
(6) 1 Vern. 268.
(7) 1 R. & M. 506.
(8) 2 K. & J. 374; and, on appeal, 5 W. R. 177.
(9) 2 Ch. D. 310.
(10) 18 Ch. D. 238.
(11) 22 Ch. D. 640.
(12) Vern. & Scri. at pp. 143–146.

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that "Courts of Equity upon an adequate compensation being made shall relieve *such* tenants and their assigns against such lapse of time, if no circumstance of fraud be proved against such tenants or their assigns." Lord Lifford, says "a great part of the lands in this kingdom, has been for a long time held by leases depending upon lives, *with covenants for perpetual renewal.* . . . These leases then were considered as perpetual interests. . . . The tenants neglected to make renewals upon the fall of the lives, and were guilty of great laches: the landlords thereupon brought ejectments, and the tenants resorted to Courts of Equity for relief: and Courts of Equity, where the breach was made up by an adequate compensation, thought that they were entitled to relief." He then refers to the case of *Murray* v. *Bateman* (1), where the lease contained a covenant for perpetual renewal, and he had himself decreed a renewal giving the lessee relief against lapse of time. He says expressly that in this case after having inquired of other judges and having examined a great number of other cases, "I did consider that there was a *local equity*, and as I have often heard it called, the *old equity* of the kingdom," and it was on this equity that he granted the relief. He then points out that the House of Lords of Great Britain, then the Court of ultimate appeal, had reversed his decision in *Murray* v. *Bateman* (1), and that the Tenantry Act was passed to remove the dissatisfaction and general alarm that resulted from the decision of the Lords. From the Act itself and this contemporary exposition of what led to its being passed it is plain that it includes by its express terms leases with covenants for perpetual renewal only, and that the *old equity* which *Bateman* v. *Murray* (2) destroyed was by the statute restored as to such leases only. *Butler* v. *Portarlington* (3) and *Roberts* v. *Mayne* (4) show that there is no equity to give relief against neglect apart from the statute.

2. A consideration of the numerous cases decided since the passing of the Tenantry Act demonstrates that its equity has never been enlarged so as to comprehend leases with covenants to renew within a limited time. In *Butler* v. *Portarlington* (3) there was a

(1) Lyne on Leases, App. Case, 9.
(2) 1 Ridg. P. C. 187.
(3) 4 Ir. Eq. R. 1; 1 Dr. & War. 20.
(4) 7 Ir. Ch. Rep. 551; 8 Ir. Ch. Rep. 525.

covenant for perpetual renewal. In *Roberts* v. *Mayne* (1) it was expressly decided that the covenant on which the case was argued amounted to a covenant for perpetual renewal. In *Murphy* v. *Jackson* (2), there was a covenant for renewal within a limited time, and Napier, C., says (at p. 507), "This case is not within the Tenantry Act, for this covenant is not for perpetual renewal." *M'Alpine* v. *Swift* (3) turned on neglect to renew a lease, where there was a covenant to renew a lease for three lives in being at its expiration; yet it was not suggested that the Tenantry Act applied. In *Firman* v. *Lord Ormonde* (4) a renewal of a lease with a covenant to grant a new lease for one life on the death of the survivor of three *cestui que vies* was decreed; but that case did not turn upon the Tenantry Act or any equity springing from it, but on the misrepresentation of the lessor's agent as to the date of the death of the surviving *cestui que vie*. In *Wisdom* v. *The Corporation of Dublin* (5) the covenant was to renew on the dropping of any life within a term of seventy years; and though the lessee lapsed his time for nominating a life, he was held entitled to renew because his ignorance as to whether occasion had arisen for renewing was excusable. In *M'Dermott* v. *Caldwell* (6) the Vice-Chancellor gave relief against lapse of time where there was a covenant to renew during a term of 1000 years. This was practically a perpetuity and perhaps the judgment may be defended on this ground; but that case is wholly different from the present, where the covenant is to renew only during a term of seventy years. The only other reported cases in which Courts have acted in analogy to the equity created by the Tenantry Act, where the leases did not fall precisely within the express terms of the Act, are *Bond* v. *Slator* (7), *Williamson* v. *Tucky* (8), where it was held that a covenant for perpetual renewal on payment of a peppercorn fine—and not a money fine—came within the analogy of the statute, and *Boyle* v. *Lysaght* (9), where it was said that a lease for years—not depending on lives—if renewable for ever came within the equity of the statute.

(1) 7 Ir. Ch. Rep. 551; 8 Ir. Ch. Rep. 525.
(2) 7 Ir. Ch. Rep. 189, 502.
(3) 1 Ba. & Beat. 285.
(4) Beatty, 347.
(5) 2 Ir. Ch. Rep. 306.
(6) I. R. 10 Eq. 372.
(7) 10 Ir. Ch. Rep. 472.
(8) 14 Ir. Ch. Rep. 407.
(9) Vern. & Scri. 135.

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3. The plaintiffs rely upon *Lennon* v. *Naper* (1), as establishing that there was an equity larger than the Tenantry Act. But that case arose on a perpetually renewable lease, and each case cited in it was a case arising on a covenant for perpetual renewal. If this wider equity ever existed it was abolished by the decision of the House of Lords in *Bateman* v. *Murray* (2), the effect of which has by the Tenantry Act been modified only as to leases with covenants for perpetual renewal.

The opinion of writers of text-books is in favour of the distinction drawn by the defendants between cases arising on covenants for perpetual renewal and the present. Furlong on Landlord and Tenant (1845), at p. 294, says:—"The Irish Tenantry Act does not embrace covenants for limited renewals, and the terms of such covenants must therefore be as strictly observed by Irish tenants, to entitle them to equitable relief, as would be required in England, from tenants under similar circumstances." In the same work it it is said (at p. 292): "If a lease merely contains a covenant for one or more renewals, or to renew from time to time during a limited period, it is incumbent on the tenant to observe with strictness the terms of the covenant, as a Court of Equity will not relieve against the legal consequences of his negligence, unless a strict performance be prevented by the default or misconduct of the landlord, or by ignorance not wilful, or by unavoidable accident."

The nomination of Judge Warren as a new life in 1871 instead of the life that dropped in 1868 was plainly late; and by the lessee having lapsed his time the inheritance was freed from the burden of granting a new life in lieu of that which had fallen; under these circumstances the receipt of the fine by Mrs. Malton, who was then only tenant for life of the reversion, could not bind the inheritance: *Becher* v. *Delacour* (3). Except under a power or under a statute, a tenant for life cannot bind the inheritance.

Further, the covenant here is to renew upon the falling of one life: there is no equity to extend it, as is sought to be done in this action, to a case where two lives have been suffered to fall: *Bayley* v. *Corporation of Leominster* (4); *Rubery* v. *Jervoise* (5).

(1) 2 Sch. & Lef. 682.
(2) 1 Ridg. P. C. 187.
(3) 11 L. R. Ir. 87.
(4) 1 Ves. 476; 3 Bro. C. C. 529.
(5) 1 T. R. 229.

Serjeant Campion, Q.C., and *Matheson, Q.C.* (with them *G. W. Walker*), for the respondents :—

Counsel for the appellants cited a number of cases, and relied on the *dicta* of Judges, and even on the conflict of judicial opinion in respect of the existence and extent of a local equity in Ireland, but were unable to adduce a single reported authority establishing the distinctive proposition on which alone this appeal can be sustained, *i. e.* that in a case where the defence is simply and only lapse of time, and where, as we submit, time is not essential, the omission of the lessee to nominate a life within the prescribed period excludes him from all relief in equity, whether on the basis of the local equity, or the higher and more general principle of equity, relieving from forfeiture where the position of the lessor is wholly unimpaired and unprejudiced.

It was contended that this was not a case of forfeiture, but a privilege at the option of one party : the appellants' own defence is a conclusive answer; for if it were sustained, the result would be an ejectment on the title against the respondents, although the term of 90 years is still unexpired.

The lessee has an unbroken tenure from 1823; he is liable to a merely nominal fine; no demand for renewal was ever made by the lessor; there is no prejudice to him; the tenant's *bona fides* is unimpeached, his large expenditure in buildings and permanent improvements is expressly admitted in the deeds.

The whole argument of the appellants is based on a misinterpretation of the Tenantry Act, ignoring the pre-existing equity, and arguing that the power to give relief in equity is only co-extensive with the statute, and only applicable to cases within the strict letter of it. The interpretation so sought to be put upon the Act is absolutely negatived by the judgment of Lord Redesdale in *Lennon* v. *Napper* (1). The Act introduced no new right whatever for the tenant : it was, in express terms, merely *declaratory* of a *pre-existing right* which was capable of being sustained on the general principles of equity in giving relief from forfeiture. That is the interpretation which Lord Redesdale puts on the statute. He refers to *Bateman* v. *Murray* (2)—which was a case of

(1) 2 Sch. & Lef. 682. (2) 1 Ridg. P. C. 187.

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fraud on the tenant's part—and *Kane* v. *Hamilton* (1)—which was not decided on lapse of time—and says that they do not decide (as some considered) that there could be no relief in any case against mere lapse of time, unless there existed some particular ground for it. He says that he has examined the earlier cases decided before the Act, and it seemed to him that they were well decided and consistent with the provisions in the Act. He adds: "The Courts in all cases of contracts for estates in land have been in the habit of relieving, where the party from his own neglect had suffered a lapse of time. . . . They dispense with that which would make compliance with what the law requires oppressive: and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction there is a condition to forfeit the deposit, if the purchase be not completed within a certain time; yet the Court is in the constant habit of relieving against the lapse of time, and so in the case of mortgages, and in many instances, relief is given against mere lapse of time, when lapse of time is not essential to the substance of the contract. Here the time is not essential." Every word of this judgment applies to the present case, where the Court ought to give the lessee the relief he seeks in order to prevent his expenditure and improvements being confiscated. The higher and general principles of equity in giving relief from forfeiture, as laid down by Lord Redesdale, apply to this case, as well as to cases of covenants for perpetual renewal.

The Tenantry Act is not to be construed strictly where a case is within the equity of it: *M'Dermot* v. *Caldwell* (2).

Time is not of the essence of the contract here: *Hearne* v. *Tenant* (3); Fry on Specific Performance, p. 492. The position of the parties here is unaltered by the lapse of time. The objection as to want of mutuality is negatived by *Morgan* v. *Gurley* (4).

As regards the *dicta* of Judges relied upon by the appellants, there is one element in them all which renders them not binding in this case—they were all made in cases the judgments in which

(1) 1 Ridg. P. C. 180.
(2) I. R. 10 Eq. 504.
(3) 13 Ves. 289.
(4) 1 Ir. Ch. R. 482, 491, 492.

were founded on grounds wholly irrespective of them. *Firman* v. *Lord Ormonde* (1) and *M'Alpine* v. *Swift* (2) differ *toto cœlo* from the present case: in each one life only was to be added to the first three lives; there was to be no extension, no succession; the time, therefore, in each was essential. The passages in the text-books referred to by the appellants are too widely expressed: they speak of "limited renewals" in general, but the cases cited as authorities are cases of leases renewable for one life only.

The defendants are bound by the nomination of Judge Warren: Mrs. Malton, the tenant for life, accepted the fine on his nomination, and thereby waived the delay: the acceptance of the fine binds the remainderman. A tenant for life under a settlement of the fee represents the inheritance for the time being, not by virtue of any special power, but by virtue of his estate: here the fine was paid and the nomination accepted nearly thirty years ago.

Job v. *Banister* (3), *Finch* v. *Underwood* (4), *Bastin* v. *Bidwell* (5), and the other cases cited to show that the nomination of the new life within six months was a condition precedent were wholly different; in each of them the matter, the performance of which was held to be a condition precedent, was a matter of substance, keeping the premises in repair or the like, the neglect of which altered the position of the lessor.

[They also cited *Ward* v. *M'Roberts* (6); *Pilson* v. *Spratt* (7); *Curry* v. *Stanley* (8); *Foley* v. *Roland* (9).]

LORD ASHBOURNE, C.:— Feb. 27.

Lord Justice Walker will deliver the judgment of the Court.

WALKER, L. J.:—

The plaintiffs in this action claim a declaration that they are entitled to a renewal of a lease of the 1st August, 1823, and that the defendants may be ordered to execute such renewal

(1) Beatty, 347.
(2) 1 Ba. & B. 285.
(3) 2 K. & J. 374; 5 W. R. 177.
(4) 2 Ch D. 310.
(5) 18 Ch. D. 238.
(6) 25 L. R. Ir. 224.
(7) 25 L. R. Ir. 5.
(8) 1 H. & J. 487.
(9) [1898] 1 I. R. 311.

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to them for the lives of the Princess Alexandra Louisa Olga, daughter of the Duke of Edinburgh, and of Princess Victoria, daughter of the Duke of York, or for such other lives as the Court should think proper.

By a lease of the 1st August, 1823, Sir Compton Domvile demised to William Sherrard that part of the lands of Kilbogget, containing 199A. 3R. 26P., to hold to William Sherrard, his heirs, and assigns, for the lives and life of the Duke of Cambridge, David Henry Sherrard, and William Nassau Sherrard, and the survivors and survivor of them, and for the lives and life of all and every such other persons and person as by virtue of the covenant for renewal should, from time to time, successively be added thereto, during the term of seventy years, from the 1st May, 1823; and Sir Compton Domvile covenanted that upon the death of the aforesaid lives or life of any of them which should first happen within the term of seventy years from the 1st May, 1823, and the tenant first paying the sum of 5*s.*, and upon the nomination of the life of any other person within six months next after the death of such person or persons by the lessee, his heirs, or assigns, at his or their own request, to be inserted in the place of the person so dying, which life, so added, was to be endorsed on the lease, or written on a deed, label, or parchment, to be affixed to the lease, or on a separate deed declaring the life so failing, and the life so added, and the three lives in being, during which the estate should be then to continue, and, in like manner, from time to time, successively thereafter during the term of seventy years upon the failure of every other life nominated in the lease and to be nominated, and upon the like nomination of any other life successively in lieu of every several life so failing as aforesaid, then the lessor would, on the like fine, successively thereafter during the said term add and insert to the term of the lease the several life or lives of the several person or persons so successively nominated in place of the several person or persons so happening to die.

By a deed dated the 29th March, 1842, the term of seventy years was extended so as to make it commence from the 29th March, 1842.

The Duke of Cambridge died on the 8th July, 1850, and by deed dated the 2nd January, 1852, purporting to be made between Sir Compton Domvile, tenant for life of the reversion, of the first part, Compton Charles Domvile (who did not execute it) of the second part, and Maria Sherrard of the third part; the life of Her Majesty Queen Victoria was added to the lease in place of the Duke of Cambridge, and Sir Compton Domvile demised the lands for the lives and life of David Henry Sherrard, William N. Sherrard, and Queen Victoria, and the survivors and survivor of them, and the life and lives of all such other person and persons as should be added to the term during the said period of seventy years, and this deed contained a covenant in the same terms as in the original lease. The appellants do not admit that the life of the Queen was properly nominated, and have intimated their intention to challenge it on the demise of Her Majesty, but, I think, we are bound to assume for the purposes of the argument that the nomination was valid and that the lease is subsisting for, at least, one life.

David Henry Sherrard died on the 7th May, 1868, and on the 1st April, 1871, the life of the Right Hon. R. R. Warren was nominated as a new life. At this date the reversion was vested in Isabella Maria Malton as equitable tenant for life, and she received the fine of four shillings and seven pence half-penny, but no deed was executed or any further act done. William Nassau Sherrard died on the 22nd February, 1879: no life was nominated in his place till the 8th February, 1898. The Right Hon. R. R. Warren died on the 24th September, 1897. On the 8th February, 1898, the plaintiffs nominated the life of the Princess Alexandra Louisa Olga in place of William Nassau Sherrard, and the life of the Princess Victoria in place of the Right Hon. R. R. Warren, and tendered the renewal fines which the defendants refused to accept.

It is not alleged that there has been on the part of the tenant any such misconduct as would disentitle him to a renewal if the lease was one renewable for ever. It is a case of simple neglect to nominate lives within the period and in the manner required by the covenant.

The Vice-Chancellor by his judgment declared the plaintiffs

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entitled to the relief they seek. He was of opinion that though the case was not within the terms of the Tenantry Act, it came within an equity which was recognised or created by that statute; that a similar injustice to that provided for existed, and that similar equitable considerations should be applied. He also rested the case upon the general doctrine of Courts of Equity as to giving relief against forfeiture, and he held that the time for nominating the lives was not of the essence of the contract. It was not necessary for him to consider specially the case of the nomination of the life of Judge Warren; but from his observations as to the nomination of the life of Her Majesty the Queen, on the 2nd January, 1852, he would probably have held that the neglect had been waived by the tenant for life's acceptance of the fine.

The respondents' counsel, in support of that judgment, contend—1, that the equity declared or kept alive for the benefit of lessees for lives renewable for ever also existed in, and should by analogy be applied to, the case of lessees holding under leases with covenants for renewal to be executed within a limited time; 2, that time was not of the essence of the contract, and that they were entitled to relief on the ordinary doctrines of Courts of Equity as administered alike in English and Irish Courts; 3, but at all events the nomination of the life of Judge Warren was valid, as the tenant for life had accepted the fine and given a formal receipt for it.

The appellants also relied, as a separate ground, on the language of the covenant for renewal, particularly the word "successively," citing *Bayley* v. *Corporation of Leominster* (1), and *Rubery* v. *Jervoise* (2); but inasmuch as I am in favour of the appellants' contention on the other parts of the case, I do not think it necessary to express any opinion as to the application of the cases cited to the covenant under consideration.

The first contention on the part of the respondents raises an important and far-reaching question, viz. whether the equity created or kept alive by the Tenantry Act applies by analogy to limited covenants for renewal, such as exist in the present case. The affirmative of this view is the foundation of the judgment

(1) 3 Bro. C. C. 329.

(2) 1 T. R. 229.

appealed against; but, after careful research, I have found no authority to support it. It does not appear to me to be within either the letter or the spirit of the Tenantry Act. The history of the Act, and the reasons for its passing, appear fully in the judgments of Lord Lifford and Lord Redesdale—notably in the cases of *Boyle* v. *Lysaght* (1) and *Lennon* v. *Napper* (2).

The tenure by leases for lives renewable for ever had been long established in Ireland. They were considered as perpetual interests, and formed the subject of family settlements and mortgages. Tenants constantly neglected to renew, and were guilty of laches; but Courts of Equity in Ireland considered that they were entitled to relief upon making compensation, which, by an invention of Chief Baron Gilbert, was measured by septennial fines.

The Judges in the English House of Lords, which had jurisdiction over the decisions in Ireland, took a different view, and the controversy appears to have been brought to a point in the case of *Bateman* v. *Murray* (3), in which the English House of Lords reversed the decree of Lord Lifford, who had granted a renewal. It is not very material to consider whether the view taken of that decision by Lord Lifford or Lord Redesdale is the correct one; because it was undoubtedly treated in Ireland as negativing the old local equity, which had preserved leases for lives renewable for ever, and, in consequence of the alarm thus created, the Tenantry Act (19 & 20 Geo. 3, c. 30) was passed. It is impossible to read the Act without seeing that its scope is limited to leases for lives renewable for ever. Its title, the recitals, the word "such," repeated through the Act, and the provisoes abundantly show this. Indeed the judgment of the Vice-Chancellor proceeds on the assumption.

The next question is how far the application of the Act has been extended. The first step was in *Boyle* v. *Lysaght* (1). That was a lease for ninety-nine years, if three named lives, or any or either of them, should so long live, and there was a covenant for renewal for ever on the fall of every life on payment of a £20 fine. A renewal was decreed, and Lord Lifford, at page 135 of the report,

(1) Ver. & Scri. 135. (2) 2 Sch. & Lef. 682. (3) 1 Ridg. P. C. 187.

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gives the reason. He says:—"If a lease for years were made, and nothing said about lives, I do not think that it would come within the Act; but if a lease were made for thirty-one, ninety-nine, or any number of years, though not depending upon lives, if it were renewable for ever, I think it would come within the old equity." Substantially the same question arose and was decided in *Austen* v. *Cavendish* (1).

In *Bond* v. *Slator* (2) no fine was reserved in a lease for lives renewable for ever, and it was held that the tenant was entitled to the benefit of the equity of the Tenantry Act. Lord Chancellor Brady points out that it would be strange that the Act "should not apply to the very case where no injury has been done by the delay, there being no money payable by the tenant, on the ground that such cases do not come within the clauses relating to making compensation to the landlord—that, in fact, the case where the landlord had suffered no injury should be less favourable to the tenant than the case where he had."

In *M'Alpine* v. *Swift* (3), a lease was granted for a term of thirty-one years, from the 1st November, 1774, and the lessor covenanted that at the end of the term of thirty-one years he would make to the tenant a new lease to commence from the expiration of the thirty-one years for the lives of three persons then in being, "provided that the tenant should nominate and appoint such three lives in writing, and under hand and seal, any time during the last six months of said term of thirty-one years thereby demised and not otherwise." The tenant did not nominate till two months after the expiration of the time, and a bill for a renewal was dismissed. It was not suggested that the equity of the Tenantry Act helped the case.

In *Firman* v. *Lord Ormonde* (4), the bill was filed for the specific performance of a covenant to grant on the death of the survivor of three *cestui que vies* in a lease, a new lease for one life, such life to be nominated by the lessee within twelve calendar months after the death of the first of the said three lives who should die. The defendant resisted the suit on the ground that

(1) Lyne, 118, n.
(2) 10 Ir. Ch. Rep. 473.
(3) 1 Ball & B. 285.
(4) Beatty, 347.

the first of the three *cestui que vies* had died on the 7th June, 1822, and the additional life was not named by the plaintiff till the 7th August, 1824. The Lord Chancellor granted relief on the ground that the plaintiff had been misled, but he states the principles applicable to the case in a manner which excludes the application of the Tenantry Act, or any supposed analogy derived from it. He says, "The present is not to be considered on the principle of those cases which declare that time is not of the essence of executory contracts. Here the lessee's title was founded on a condition precedent, to name the person within twelve months, so that the lessor might have from that time the chances incident to human life; the condition not having been literally complied with, Lord Ormonde's covenant is gone at law, and a Court of Equity can only give relief on it when special circumstances require its interposition, and it is on the existence of these circumstances that my opinion is formed." He then refers to *Eaton* v. *Lyon* (1) as laying down the principles by which he should be guided, excusing the party from the performance of the condition only in case of fraud, surprise, or ignorance not wilful.

The case of *Wisdom* v. *Corporation of Dublin* (2), also a case of a limited right of renewal was decided on the same grounds, and in the same way as *Firman* v. *Lord Ormonde* (3). It was not contended that any aid was derived from the Tenantry Act, directly or indirectly.

There are several cases before Lord St. Leonards in this country, in which he has given an exposition of the Act, affording no support to the plaintiffs' case. In *Butler* v. *Lord Portarlington* (4), which was a bill by a lessee for lives renewable for ever to enforce a renewal, Lord St. Leonards says, "If this were a case in which specific performance were sought for in any of the Courts of Westminster, it could not stand for a moment. But for the Tenantry Act in this country, it could not be contended that the plaintiff was entitled to a renewal, because the circumstances are not such as, independent of that Act, would

(1) 3 Ves. 690.
(2) 2 Ir. Ch. Rep. 306.
(3) Beatty, 347.
(4) 4 Ir. Eq. R. 1.

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entitle him to the assistance of a Court of Equity." And further on he says: "On one side it is contended that this is a penal Act, and that the Court is not to be called on to construe it strictly, in order to create a forfeiture of the tenant's right; on the other side it is alleged that there is no forfeiture, and that the Court is only to abstain from giving its assistance to the tenant. . . . It rests therefore upon the party claiming the benefit of the Act to bring himself within its terms, and to show that the case is such, as the Act intended to relieve."

In *Alder* v. *Ward* (1), Lord St. Leonards again refers to the Tenantry Act, and an argument founded upon the extension of it to *Boyle* v. *Lysaght* (2). He says, "The equity in this country is one which has been called local; it is not universal, it is not inherent, and though it has been considered in some of the cases that the Tenantry Act is a declaratory statute, it is so only of the local equity which does not prevail in England. It, therefore, is not founded upon the general rules of equity, but it has sprung up in this country alone, and has become the law of the country. Its object, and that of the Tenantry Act was only the relief of the tenant, and not that of the landlord. . . . It has been stated truly that there are mischiefs which have been held to be within the Act, although not expressly provided for by it, but it will be found that they are within the equity and intention of the statute. I therefore do not find fault with the extension of the Act to those cases, but the decisions are not authorities for the extension of the Act to cases beyond the mischief intended to be remedied."

The very question I am now considering, arose in the case of *Murphy* v. *Jackson* (3). The agreement for renewal contained in a lease for three lives was "on the decease of any of the above three mentioned persons, to put in another person's life in said lease," the lessee giving notice in twelve months of the decease of the said life. The objection of the respondent so far as material to the case, was that no notice was given, or life nominated within twelve months after the fall of the surviving life in the lease.

(1) 2 Jon. & L. at p. 597. (2) Vern. & Sori. 135.
(3) 7 Ir. Ch. Rep. 189.

The Master of the Rolls takes as the foundation for his decision in favour of the respondent the passage in the work of the eminent text-writer, Mr. Furlong, p. 292, which is, "If a lease contains a covenant for one or more renewals, or to renew from time to time during a limited period, it is incumbent on the tenant to observe with strictness the terms of the covenant, as a Court of Equity will not relieve against the legal consequences of his negligence, unless a strict performance be prevented by the default or misconduct of the landlord, or by ignorance not wilful, or by unavoidable accident." The case was affirmed by the Court of Appeal (1). The Lord Chancellor and Lord Justice Blackburne adopted the reasoning of the Master of the Rolls. The Lord Justice says (2), "as to now permitting the respondent to nominate a life, no case whatever has been made for relieving the parties, on the ground either of fraud or inevitable accident."

It was argued by Serjeant Campion, that the cases of *M'Alpine* v. *Swift* (3), *Firman* v. *Lord Ormonde* (4), and *Murphy* v. *Jackson* (1), were not applicable, inasmuch as the covenants for renewal were different, and here there was a life in being (that of the Queen), and that the term of seventy years had not come to an end, but the value of the decisions is that they state the rule applicable in the case of all limited covenants for renewal, and define the only equitable consideration that can arise.

But the next case in which the point came to be considered by Mr. Smith, M.R., is exactly like the present. It is *In re Cootes, Minors* (5). The lease, dated in 1825, was one made by Charles Coote to John Boyd for three named lives, and the natural life of the longest liver of them, and for the lives of such other person and persons as should from time to time successively during the term of forty years be added to the demise. The condition for renewing mentioned in the covenant was if the tenant should within six calendar months after the death of any of the lives, apply and pay a half-year's rent by way of fine. One of the lives died on the 30th November, 1834, and another on the 8th July,

(1) 7 Ir. Ch. Rep. 502.
(2) 7 Ir. Ch. Rep. at p. 507.
(3) 1 Ba. & B. 285.
(4) Beatty, 347.
(5) 7 Ir. Jurist, 234.

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1850; and one, that of Princess Mary, Duchess of Gloucester, was in being. The tenant presented a petition in the minor matter for a renewal. The Master of the Rolls referred to the same passage in Furlong which he had mentioned in *Murphy* v. *Jackson* (1), and then proceeds:—"Now, here there is only a limited right of renewal, and one of the lives has not been in being for several years, and the other dropped five years ago, and then the tenant comes forward and says, 'I will now get a renewal or bring the minor into Court.' Such a renewal is not within the Tenantry Act, and were it not that the premises here are of small value, only about £9 a-year, I would require a cause petition to be filed by the tenant, and it would fail unless it was shown that the landlord was in default." The guardians of the minor ultimately consented to the renewal being made.

In my opinion there is no authority for the position that the Tenantry Act can be resorted to for the purpose of supplying any argument, either directly or by analogy in support of the enforcement of a covenant for limited renewal such as exists in the present case. The case of *M'Dermot* v. *Caldwell* (2) may be subject to different considerations from the present, and I express no opinion on it.

2. Is there any ground for compelling the granting of a renewal in the case of a limited covenant like the present upon the general doctrines of Courts of Equity where there does not exist fraud or surprise, or inevitable accident, or some personal equity against the contracting lessor? It is said that equity relieves against forfeiture when compensation can be given, and that in a case like this, time is not of the essence of the contract. It is necessary to keep in mind what the true character of such a covenant as exists here is. It is a covenant inserted for the benefit of the lessee—a covenant to grant an estate on certain specified conditions which the lessee may, or may not, enforce or comply with at his option, he being under no obligation himself. I think that once we are obliged to hold that the old Irish local equity kept alive by the Tenantry Act is inapplicable, we are compelled to construe the covenants strictly, and hold that when the covenant

(1) 7 Ir. Ch. R. 189. (2) I. R. 10 Eq. 504.

is gone at law, equity will not interfere with the contract. This is the principle on which the old cases of *Baynham* v. *Guy's Hospital* (1), and *Eaton* v. *Lyon* (2) were decided. *Harriss* v. *Bryant* (3) was a case of a lease for lives renewable from time to time on the falling of each life on payment of a small fine, provided application were made for renewal within six months after the life dropped. A life dropped on the 31st January, 1822, and no application was made till the 12th November, 1822, and a bill of renewal was dismissed. *Job* v. *Banister* (4) is a case to the same effect, and so is *Finch* v. *Underwood* (5), where James, L.J., says: "The case is one of condition precedent. It is not a case of forfeiture, and none of the considerations applicable to forfeiture apply to it. A renewal of a lease is a privilege to which the tenant is to be entitled in certain circumstances and on certain terms."

In *Bastin* v. *Bidwell* (6) all the cases are reviewed by Lord Justice Kay, and he arrived at the same conclusion.

We were pressed by Serjeant Campion with the observations of Lord Redesdale in *Lennon* v. *Napper* (7), in which he referred to the general doctrines of the Court in regard to contracts for sale, and applied those to the renewals of leases. These observations came under review by Mr. Justice Pearson in *Nicholson* v. *Smith* (8). I need not refer to the facts of the case; but (at p. 656) he says:—"There Lord Redesdale—stating with very great accuracy the doctrines of this Court with regard to contracts of sale—applies to the case of a renewal of a lease the same equity which the Court is in the habit of applying daily to contracts of sale, and says that where the Court sees the substance of a contract is the payment of money, the Court will not allow the contract to be avoided simply because there has been a delay in the payment of the purchase-money, seeing that the delay can be fully compensated for by the payment of interest. But looking at the case of *Lennon* v. *Napper* (7), I am of opinion that that passage which I have read must be held to apply to the practice of the Court in Ireland with regard to the renewal of leases, a practice

(1) 3 Ves. 295.
(2) 3 Ves. 690.
(3) 4 Russ. 89.
(4) 2 K. & J. 374.
(5) 2 Ch. D. 310.
(6) 18 Ch. D. 238.
(7) 2 Sch. & Lef. 682.
(8) 22 Ch. D. 640.

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which at the time when Lord Redesdale delivered his judgment had been—I think I am not wrong in stating—so wild that the Legislature had thought it right to restrain it by an Act of Parliament, which was passed purposely for enacting under what circumstances only leases might be renewed, and in fact, as far as I understand it, limiting the power which the Court of Chancery had exercised formerly of granting indiscriminately renewals of leases when the time within which they ought properly to have been renewed had elapsed. I do not think I should be justified in transporting that practice or founding my decision upon the statement of Lord Redesdale in that case, more especially when I find that in another case in the year 1807, to which Mr. Davey also referred me, *City of London* v. *Mitford* (1), Lord Eldon says: 'I shall not notice the cases further than by observing that there is a great distinction between this and the cases upon leases for lives; and that, where there has been default of this kind in making a request, unless it has been excused by circumstances, there is no authority for decreeing a specific performance.' I confess that looking to this document, looking to what was the manifest intention of the parties, namely, that if the lessees desire it there should be a renewal of the lease, I should be exceedingly willing, if I thought I had the power, to adopt Lord Redesdale's view. I think in a case like the present I should only be doing justice to the parties in saying that if there had been, as there was in this case, a manifest slip with regard to giving notice for renewal of the lease, where the intention of both parties was that upon payment of a fine of £1000 the lease should be continued in perpetuity, I should be justified in saying that the proper construction of this lease would be that if even after the expiration of the lease within any reasonable time (there being no misconduct in the lessees, there being no attempt on their part to do anything that was tricky or treacherous) they agreed to accept the lease, they ought to have the right to do it. But I do not feel myself justified by what I believe to have been the practice and the decisions of this Court in adopting Lord Redesdale's views."

The landlord may be much injured by the omission to nominate

(1) 14 Ves. 58.

a life at the covenanted time. He may have a younger life put upon him and his position altered if the nomination can be validly made later.

For those reasons I think that in the case of the fall of the life of David H. Sherrard, the covenant to renew was gone at law on the 8th November, 1868, and in the case of the fall of the life of William Nassau Sherrard the covenant was gone on the 23rd August, 1879, and that no equity existed or exists to enforce the performance of the covenants for renewal, apart from any special circumstances connected with the nomination of the life of Judge Warren on the 1st April, 1871, which I shall now shortly consider.

In April, 1871, the interest in the lease was vested in James Ormsby Sherrard, and the interest in the life estate in the reversion was vested in Sir Frederick Leopold Arthur and four other trustees, in trust for Mrs. Isabella Maria Malton during a term of ninety-nine years, determinable on her death, for her separate use, and subject thereto for Mrs. Malton and her husband Charles J. A. Malton in her right during her life. Mrs. Malton had been the widow of Compton Charles Domvile, and took a life estate under his will, and she put her life estate in settlement on her second marriage. The will of Compton Charles Domvile, under which the reversion devolved, contained a power to every adult tenant for life to grant renewals of leases containing covenants for perpetual or temporary renewal, and also a special leasing power not applicable to the case.

On the 2nd April, 1871, the inheritance of the lands was free from the burden of the covenant for renewal so far as related to David H. Sherrard's life: the condition in the lease is—1, that the fine should be paid; 2, that the life should be nominated within six months; 3, that the life so added and inserted should be endorsed on the lease, or written on a deed, label, or parchment, to be affixed to the lease, or on a separate deed or writing, declaring the life so failing and the life so added in lieu thereof, and the three lives in being during which the said estate should be then to continue.

What occurred was that James Ormsby Sherrard paid to the five trustees for Mrs. Malton the fine of four shillings and seven pence half-penny, and the trustees executed a writing acknowledging to

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have received the payment of the renewal fine upon the decease of David H. Sherrard, and upon the nomination of the life of the Right Hon. R. R. Warren, in the terms of the lease in lieu of David H. Sherrard. No notice was served on the trustees of the will of Compton Charles Domvile, and at the date of the institution of this action the defendant Herbert W. Domvile was tenant for life of the reversion under the will of Compton Charles Domvile.

The argument is that Mrs. Malton and her trustees waived in 1871 compliance with the conditions by accepting the fine, and that such waiver was effectual, though she was only tenant for life. It has been said in some of the cases to which the equity of the Tenantry Act applies that the payment of the fine is the substantial thing, and in such a case I do not know how any question could arise after its payment and receipt; but in the present case the conditions should be strictly performed, and their performance was impossible in 1871, and the inheritance was free from the obligation. There was no waiver or release by those representing the inheritance, and the act of Mrs. Malton if operative would be to reimpose the burden on the inheritance by the act of putting the fine in her own pocket. I can understand in a case where the tenant applied within the named period and was put off by some misrepresentations made by the tenant for life, that the renewal should be enforced; but after the condition has once ceased to be capable of performance, I think any act of the tenant for life in receiving a fine can only create an equity against herself *in personam*. She might as well be competent in 1898 to receive the fines on the fall of the two lives, and set up the lease for two fresh lives. It was settled in *Becher* v. *Delacour* (1) that though a tenant for life of a settled estate represents the estate for the purposes of the payment of interest on and making acknowledgments in respect of charges while they bind the estate, his power to bind the estate in respect of them ceases, save as against himself, when they cease to be charges by virtue of the operation of the Statute of Limitations. The fallacy seems to me to be that, to give the effect desired to the receipt of the fine we should be treating the case as affected by the equity of the Tenantry Act, and looking on the

(1) 11 I. R. Ir. 187.

covenant in respect of this life as being a living equitable obligation in 1871.

The case of *Doe* d. *Sperling* v. *Houghton*, reported in Lyne (1), is very like the present, and in my opinion a complete authority on the point. It was an ejectment on the title, and it appears that by a lease of the 17th March, 1770, the Earl of Belvidere demised to Garrett Tyrrell certain lands in Westmeath, to hold for three named lives, and the survivors and survivor of them, and also for the lives of three persons whom Garrett Tyrrell, his heirs or assigns, should successively nominate in their place upon each of their deaths. The covenant for renewal was to the following effect, viz., that if the said G. Tyrrell should within one calendar month after the fall of the first life, nominate a life in the place thereof, then the said lessor would renew the said lease for the term of such new life, and the lives of the surviving *cestui que vies*; and that if the lessee should neglect to nominate such life within one month, then if he should nominate a life within three months from the end of the first month, and on payment of the sum of £100, the lessor would add such life to the term of the lease. The covenant as to the second and third lives was similar, except that the *nomine pœnæ* was £150 for renewal of the second, and £300 for the third. The lessor's estate became settled on William Rochfort as tenant for life, with remainder to J. Sperling, lessor of the plaintiff. Garrett Tyrrell, a life in the lease, died, and in 1787 Richard Fitzgerald, another life, died; and on the 6th June, 1796, William Rochfort, the tenant for life, renewed the lease for two new lives and the subsisting one. William Rochfort died in 1798, and in 1809 Edward Fitzgerald, the last life, died. William Rochfort's widow married Colonel Browne, and she received the rent under the renewal. A notice to quit was served in 1833, and in 1834 an ejectment was brought. At the trial a verdict for the defendant was directed, but the verdict was changed by the Court of Queen's Bench into one for the plaintiff. The plaintiff contended that the lease of 1796 was a violation of the leasing power in the settlement of 1788, because it was not in strict pursuance of the covenant for renewal in the lease of 1770,

(1) Lyne, App. Case 22, p. lxxxiv.

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having been executed after the periods within which, by the terms of that covenant, a renewal should be made. The defendant answered:—"The objection is equally applicable to leases for lives renewable for ever as to this lease, for a court of law will not put a different construction upon a covenant for a limited renewal, from what it would upon a covenant for perpetual renewal with the like limitations in point of time. The new estate which arose from the nomination was founded upon the Common Law doctrine of the enlargement of estates. The tenant could not be bound by the settlement of 1788. . . . The covenant is, strictly speaking, a condition to enlarge the estate upon certain acts done by the lessee. It was a question for the jury as to whether the terms of the covenant had been complied with by the tenant." The plaintiff's counsel contended that the proof of the performance of the condition was open to the defendant, and there had been no evidence of it. "The case is reduced to this: it is a case of a lease executed by a tenant for life, not pursuant to his settlement or to the terms of the covenant in the original lease. The enlargement could take place only on strict compliance with those terms. By what possibility can a person, merely fulfilling a contract by which he is bound, grant a greater estate than he has? Supposing Lord Belvidere had continued seized in fee, and that the life was not nominated until twelve months after the fall of the first life, it could not be contended that the estate was enlarged. Even though Lord Belvidere had waived the delay, the subsequent nomination could not at law prevail to enlarge the estate, for that would be to enlarge the estate, not by anything contained in the instrument, but by something extrinsic to it; and a freehold cannot be called into existence at law by anything *dehors* the deed. But there is no pretence for saying that a tenant for life can waive the time for nomination. As to the presumption of a confirmation there is no consideration from which it can be presumed that the renewal was confirmed." Bushe, C.J., gave the judgment of the Court. He read the covenant and said:—"Strictly speaking, this is that there should be no renewal unless the tenant nominated a life within the period prescribed by the covenant." He then refers to the evidence, which was to the effect I have already stated, and continues:—"The only question was whether the

renewal was good, for it was not in compliance with the covenant in the lease. Therefore as this case went to the jury without any other evidence, the direction I gave to find a verdict for the defendant was wrong, and the direction ought to have been to find a verdict for the plaintiff." In other words the Court held that the renewal by the tenant for life after the period mentioned in the covenant was inoperative.

The obligations to renew by virtue of the covenant attach upon the estate of the tenant for life as the burden of the covenant runs with the land, and to that extent he is competent and bound to keep up the liability of the inheritance; but I cannot attribute to him a dominion exceeding his liability. The granting of a renewal by a tenant for life is not the exercise of a power, but a carrying out of his representation of the inheritance for the purpose of discharging its obligations. I am not at all clear that the title in this case warrants the putting of Mrs. Malton and her trustees in the position of such a tenant for life, but I assume it does. It is a common thing to find trustees of a will invested with power to execute renewals, and so here the tenant for life has the same powers. I think that is but an expression of the powers derived from her position as tenant for life. They are conferred with a view to her carrying out obligations which the inheritance is bound to discharge, and to the extent that she imposes a new obligation on it I think her act is unauthorized save as regards herself.

I am therefore of opinion that the plaintiffs have no higher rights in respect of the nomination of Judge Warren than they have in respect of the life of William Nassau Sherrard, and that the appeal should be allowed and the action dismissed.

FITZ GIBBON, L. J.:—

The essential difference between our view of this case and that taken by the Vice-Chancellor, is that he regarded the question as being

> "Whether mere neglect to nominate new lives within the prescribed period is sufficient to disentitle him to the relief which the Court on its general principles affords in case of forfeiture."

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We, on the contrary, hold the action to be in its nature *a suit for specific performance* of the covenant for renewal contained in the lease of the 1st August, 1823, and the plaintiffs must show that, at law or in equity, they are entitled to enforce that covenant. Whether it is enforceable at law must depend on its terms, of which the construction must be the same at law and in equity. The right of renewal is by the terms of the contract limited to a term of seventy years—afterwards made to run from the 29th March, 1842, and by the condition that, upon each death of a *cestui que vie* happening within that term, the lessee, first paying a renewal fine of five shillings, should nominate the new life within six months. Relief is now claimed in respect of the nomination of one life in place of William Nassau Sherrard, who died on the 22nd February, 1879, and of another in place of Judge Warren, who died on the 24th September, 1897.

The statement of claim, paragraph 6, admits that no notice of renewal was served, or new life nominated, in place of W. N. Sherrard, until the 8th February, 1898, nineteen years after his death, and no allegation is made in explanation or excuse of this delay. On the same day, within six months from the death of Judge Warren, a life was nominated in his place. If the plaintiffs are entitled now to nominate either or both of the lives named in their notice, they are entitled to relief in the action. They nominated the life in place of Judge Warren in due time, but that nomination is disputed upon the ground that Judge Warren himself was not nominated within six months after the death of David Henry Sherrard, an original *cestui que vie* who died on the 7th May, 1868, and therefore that the defendants are not now bound to accept a life in his place.

The nomination of Judge Warren was made by writing dated the 1st April, 1871, delivered only to Mrs. Malton, a beneficial tenant for life of the reversion, and to trustees for her. The fine was paid to them, and they gave a receipt for it as received "upon the nomination and insertion of the life of Judge Warren in the time and term of the lease in lieu and stead of David Henry Sherrard."

The claims to enforce the two nominations now in question, therefore, arise upon different circumstances, and the right in

Judge Warren's case may be established on grounds not applicable to the nomination in place of William Nassau Sherrard. But if this latter nomination be established, either under the terms or "equity" of the Tenantry Act, or by "the old equity of the country," or upon the "general principles" of the Court, the right to the second nomination will be equally established. "Mere delay" in making the nomination beyond the time prescribed by the contract occurred in both cases. No fraud, accident, or other exceptional circumstance is alleged, and no explanation of the delay beyond the prescribed period is offered in either case. We have therefore to deal with mere neglect to observe the terms of the contract by the party who seeks to enforce it, and the relief sought is relief from the consequences of his own neglect, with the consequent imposition upon the opposite party, under the name of equity, of a greater obligation than the contract imposed upon him.

The Tenantry Act does not apply in terms, because it gives relief only to "tenants holding under leases for lives containing covenants for *perpetual* renewal," and this lease is renewable only for lives nominated during a term of seventy years. But the Vice-Chancellor has held that the Act has not "received a strict construction," nor been "restricted to cases within its letter"; that, "being a remedial Act, it has been acted upon in cases within the *equity* of it, *i.e.* cases where a similar injustice exists, to which a similar equitable consideration should, in order to prevent a like wrong, be afforded by a Court of Equity." Assuming all this, we must ascertain the scope and nature of the Act, in order to ascertain the limits within which its effect may be extended. Its scope is limited—(*a*) to leases *perpetually* renewable; (*b*) to cases of mere neglect; and (*c*) to cases where full satisfaction can be made to the lessors. But, in my opinion, its scope is further limited by the equity which it recites as the occasion of its enactment. It is not, in the technical sense, a "Declaratory Act," which means an Act passed to remove doubt as to what the law is. But it is in a sense declaratory, for it declares that a certain opinion has prevailed, and it gives effect to that opinion—*i. e.* it enacts it on certain terms. It recites the mischief which it removes. This mischief, in plain terms, consists in the ruinous consequences which would follow if effect were

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not given to the opinion to which for a long time some decisions in Courts of Equity and declarations of Judges had given countenance, that Courts of Equity would in certain cases relieve against the lapse of time, upon giving adequate compensation. It gives statutory effect to this received opinion. In thus validating it, it is an enacting statute, for it assumes that, but for the statute, effect could no longer be given to the received opinion, and ruinous consequences would follow. We know that the immediate object was to restore the course of the Irish decisions which had been interrupted by the decisions of the English House of Lords, after it had become the tribunal of last resort for the United Kingdom. But all this plainly shows that neither the equity of the statute, nor any principle of equity founded upon analogy to it, can be carried beyond cases to which the recited "received opinion" before the Act, or some similar course of judicial decision since the Act, would apply. Anything beyond this which may be referred to under the specious name of "the old equity of the country," can be nothing more than indulgence for our national unpunctuality.

It appears to me that the uniform course of decision, both before and since the Act, has limited this so-called "equity" to cases in which the demise proves an intention that the tenure shall be *perpetual*. The equity of giving effect to this intention against a mere neglect to renew which would defeat it, is expressly mentioned in the cases and text-books, and affords at least a plausible reason for relieving against the letter in aid of the intention of the contract. The equity to relief in the cases of leases *for years* perpetually renewable, and of leases perpetually renewable on pepper-corn fines, is really the same as that which the Act validates, and the Vice-Chancellor may even have been justified, in *M'Dermott* v. *Caldwell* (1), in regarding 1000 years as in the sight of equity equal to eternity. But no case, until this, has given relief where the intent that the tenure shall be perpetual does not exist. The English authorities and the general principles of equity alike prescribe that specific performance can only be enforced upon the terms of the contract, and that a party who has

(1) I. R. 10 Eq. 534.

not observed it on his side, cannot be relieved from the contractual consequence of his own mere neglect.

The Vice-Chancellor seems to have thought that relief could be grounded upon wider grounds in leasehold renewal cases, on the analogy of the Tenantry Act, or on "general principles." But the most general principle is that contracting parties have no right in equity which the contract has not given them, and to bring in either the equity or the analogy of the Tenantry Act, it seems to me that there must be some evidence that the case is within the mischief against which the Act was directed. That mischief was the consequence of allowing parties to be misled by relying on judicial authority.

If there was a received opinion in Ireland, countenanced by decisions of Courts and declarations of Judges, in cases outside the terms of the Tenantry Act, it might be said that effect should be given to it, in analogy to the Act, in cases to which it applied, and that there would be a kind of equity to relief from the consequences of misplaced reliance upon Irish Courts or Judges, however contrary to English law or practice their action might have been.

But the very passing of the Tenantry Act, confined in recital and enactment to leases renewable for ever, indicates both that the mischief had gone no farther, and that a further Act would be necessary before we could extend the relief which was given.

So far from there being any evidence, either before or since the Tenantry Act, that there has ever been a "received opinion" going beyond that which is recited in the Tenantry Act, now 120 years old, and extending to leases with limited right of renewal, there is no case in which effect has been given to such an opinion; there has been none until now in which it was even expressed; and the opposite is stated in the two Irish text books of highest authority on the subject. Furlong, cap. 7, 36, p. 292, says:—

> "If a lease merely contains a covenant for one or more renewals, or to renew from time to time during a limited period, it is incumbent on the tenant to observe with strictness the terms of the covenant, as a Court of Equity will not relieve against the legal consequences of his negligence unless a strict performance be prevented by the default or misconduct of the landlord, or by ignorance not wilful, or by unavoidable

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accident. Ignorance is considered wilful where a person neglects the means of information which ordinary prudence would suggest, and accident is not unavoidable which reasonable diligence might have prevented. It is quite clear that ignorance of a party's own rights, or of instruments in his possession or power, an ignorance to which the adverse party is in no way auxiliary, cannot excuse a non-performance of anything incumbent on that party to perform."

Among the authorities cited for these principles is the Irish decision in *M'Alpine* v. *Swift* (1), in 1810.

Lyne says (p. 172):—"To bring the case within the Act, the covenant must be for *perpetual renewal*." There is no trace of authority for the extension of the statutory relief to a case where the right of renewal is limited to a term of years. In such cases the intention that the tenure shall continue is absent: the tenure is to terminate whenever the period fixed by the contract runs out. It is impossible to contend that time is not of the essence of the stipulation fixing the time for nominating fresh lives. If the tenant could wait for twenty years, he could wait until the period fixed by the lease was running to a close; borrowing a metaphor from the cases, the intention being that the tenure should last only while a triple set of candles, each replaced immediately as it burned down or was blown out during a limited time, might continue to burn, the chance of its duration would be immeasurably increased if three fresh candles could be lighted all at once at the last minute.

For these reasons, it seems to me plain that no relief can now be given in respect of the life which dropped in 1879, either under the Tenantry Act, under any analogous equity, or under any principle hitherto recognised as applicable to specific performance of contracts.

There is more difficulty about the claim to substitute a life for that of Judge Warren; but upon principle and authority, I find it impossible to discover any equitable ground for relief. If the suit were brought against the person who received the fine, and accepted the life, the plaintiff might be entitled to succeed. But why? The claim for specific performance of the covenant for

(1) 1 B. & B. 285.

renewal would then rest upon a waiver by the lessor of a provision for his own benefit, and consideration for the waiver would be found in the payment of the fine. The terms of the receipt would prove that the original contract was, for valuable consideration, treated as still in force, and the lessor might be estopped, if not by express contract or admission for value, at least by conduct, from afterwards disputing the validity of the nomination. But the claim is now made against a remainderman holding the reversion by title paramount. No doubt, where a lessor's estate is in settlement, each successive owner of the reversion for a limited interest represents the whole estate for the purpose of performing a covenant for renewal: the Renewable Leasehold Conversion Act supplies an instance of this. But when the right of renewal is gone, as it was gone when Judge Warren was nominated, the estate was bound by no obligation to renew, and though the limited owner might bind himself or his own estate, he could not bind the estate in remainder, either by a new contract, or by a waiver which would have the same effect as a new contract, so far as regards the reversion. Possibly a difficult question might arise if a limited owner had misled the tenant, but that has not occurred here. The point moreover seems to be expressly ruled by *Doe* d. *Sperling* v. *Houghton* (1). There it was argued for the landlord that a person merely fulfilling a contract by which he was bound could not grant a greater estate than he had; that even if the lessor had continued seized in fee, and the life was not nominated within the prescribed period, it could not be contended that the estate was enlarged, even though he had waived the delay; that the subsequent nomination could not at law prevail to enlarge the estate, not by anything contained in the instrument, but by something extrinsic to it; and that a freehold cannot be called into existence at law by anything *dehors* the deed, and that there was no pretence for saying that a tenant for life could waive the time for nomination. The King's Bench yielded to this argument, and gave judgment in ejectment on the title for the plaintiff, although a life accepted by a tenant for life after the specified time was still in being; the renewal was held bad, and the defendant was held

(1) Lyne, p. 54; App. Case 22, p. lxxxiv.

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to be only a tenant from year to year, because in the words of Bushe, C. J., "the renewal was not in compliance with the covenant in the lease."

For these reasons the action must, in my opinion, be dismissed, with costs here and below. We have no means of deciding, and we do not decide, anything about the validity of the nomination of the life of Her Majesty. This question can only be raised by the lessor, and it is not now before us, but it should be mentioned, because the defence has been skilfully framed so as to suggest that if the nomination of Judge Warren be bad, that of the Queen is equally bad.

We do not know, however, whether the facts are the same. We do not know what estates were bound by the deed of renewal which was executed on January 2, 1892, and, for all that appears upon that deed, the life may have been nominated within six months after the death of the Duke of Cambridge, for which it was substituted, though the renewal was not executed until after that period had expired.

Another argument was addressed to us by the defendants, upon which we express no opinion, though it would have been necessary to decide it if the nomination of Judge Warren only had been held valid. Mr. Ronan contended, upon the authority of *Bayley* v. *Corporation of Leominster* (1), that one life could not be admitted unless two others were still in being. This point will be open to the lessor, if he should hereafter dispute the claim to nominate a life in place of the Queen. For the present, I shall only say that the authority relied upon appears to me to rest upon the special terms of the covenant, and that I am not satisfied that it applies to a covenant in the terms of that contained in the lease of August 1, 1823.

HOLMES, L. J. :—

The question considered by the Vice-Chancellor is, I think, reasonably clear. Indeed it would probably never have become a question at all were it not for a well-known infirmity of human

(1) 3 Br. C. & C. 529.

nature. Judges, like other men, when convinced against their will, are often of the same opinion still.

Lord Lifford, when he came to Ireland, found many local habits, customs, and legal problems for which his English experience had not prepared him. Amongst other things he discovered that much of the land in the country was held under leases for a term of lives containing a covenant binding the landlord for the time being, upon the death of every original or substituted *cestui que vie*, to add such life as should be nominated by the tenant within a limited period upon payment of a stipulated sum of money as a renewal fine. He also found that tenants having this valuable tenure often neglected to nominate a life and pay the fine within the prescribed time; and that Courts of Equity had been in the habit of granting relief against negligence of this kind, where there was no fraud or unfair dealing, by decreeing a renewal after the time had expired, upon the tenant making adequate compensation for the loss sustained by the landlord in consequence of the fines not having been punctually and regularly paid.

Lord Lifford, as Lord Chancellor of Ireland, administered this branch of the law on the same principles as his predecessors; and, doubtless, he could have given plausible reasons in support of the old equity of the country. The intention of the contract contained in a lease for lives renewable for ever is, that the tenant is to have a perpetual freehold interest in the lands upon making certain periodical payments; and it may be said that the time of payment is not an essential part of the agreement when the landlord, by the system of septennial fines, and by charging interest on the amount due, can be protected against loss.

The British House of Lords, however, which was then the supreme appellate tribunal for Irish causes, did not accept this view of what was equitable when hearing appeals from Lord Lifford.

Although *Kane* v. *Hamilton* (1) and *Bateman* v. *Murray* (2) may have been decided on other grounds, Lord Mansfield and Lord Thurlow expressed a strong opinion that if the tenant neglected to demand a renewal within the time prescribed by the covenant,

(1) 1 Ridg. P. C. 180. (1) 1 Ridg. P.C. 187.

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relief ought only to be granted where it was warranted by special circumstances.

This statement of the law caused great alarm in Ireland, and led to the enactment of the Tenantry Act in the year 1779. Lord Lifford, as sometimes happens with Judges, even at the present day, was better satisfied with his own decisions than with that of the appellate Court; and he was not a little hurt that the Irish Parliament in the remedial statute conveyed that the English law was better than his own. Accordingly, both he and other peers expressed strongly the view that the right to relief existed independently of the Act, and was not necessarily measured by its provisions.

Lord Redesdale, who came to Ireland as Lord Chancellor before Lord Lifford's contemporaries had died out, adopted the same tone, and regarded the Tenantry Act as merely declaratory of the old local equity.

The feelings that gave rise to this controversy have long since passed away; and, indeed, the controversy itself was almost purely academic. Whether the statute enacted new law, or declared what the old law was, the tenant's right to enforce a renewal where, through his own negligence, he has allowed the time to lapse, is fixed by its provisions. This has been laid down by Lord Chancellor Sugden, Lord Justice Blackburne, Mr. Smith, and other Irish Judges; and it does not now admit of doubt. The "old equity of the country," "the received opinion in this kingdom," is only known to us by what we find in the statute. If the tenant seeking relief comes within its terms, he is entitled to succeed. If he does not, his case must be dealt with under the law as it is administered in England and Ireland alike.

Some confusion is introduced into the consideration of this subject by describing a claim to enforce a right of renewal after the prescribed time has been allowed to lapse as a claim to be relieved from a forfeiture. This description is inaccurate, and calculated to mislead. A tenant who seeks to compel the reversioner to renew a lease, pursuant to a covenant therein, is claiming the specific performance of a contract and not relief from a forfeiture. He must show that he has fulfilled the terms of the agreement on his part, and if the covenant to grant a renewal is made dependent upon

the nomination of a substituted life within a specified period after another life has fallen, and he has failed to perform this condition, he cannot succeed unless he can show that time is not of the essence of the contract.

It is clear that a case like the present is not within the terms of the Tenantry Act, and it is equally clear, both upon principle and as the result of repeated decisions, that where the covenant to renew is temporary and not perpetual the nomination of a life within a specified period after the death of the *cestui que vie*, whose place is to be supplied, is a condition precedent to the tenant's "right of renewal." Holmes, L.J.

The prejudice which might in such cases arise to the landlord from delay can be neither measured nor compensated for. The covenant in the lease before the Court entitles the tenant, up to the year 1912, upon the death of a life, to nominate another within six months. The intention is, that the lessee's interest should come to an end upon the fall of the lives that will be in existence in that year. Now, William Nassau Sherrard, one of the lives, died in 1879; no *cestui que vie* was nominated in his place until the year 1898, and the neglect is wholly unexplained. How can it be said that the contract in its essence is not thus violated? A lease for a life named twenty years ago is a different thing from a lease for a life named now for the first time. Which of the two terms will last the longer is a matter of uncertainty, as every event dependent on the duration of human life is; but the latter, according to the ordinary estimate of mankind, is the more valuable interest.

Indeed the element of doubt, which must always exist where there is a covenant to renew for lives during a limited period, is the strongest reason for keeping the parties to the strict letter of the contract. If the question is to be determined by the light of legal principle, the result cannot be doubted; and judicial declaration is not less clear.

I do not propose to examine the authorities, to many of which reference was made during the argument. It is enough to say that except perhaps in a previous judgment of the Vice-Chancellor himself, I cannot find in text-book or reported cases anything to support the conclusion at which he has arrived. I

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therefore hold that the plaintiffs are not entitled to have any life substituted for that of William Nassau Sherrard.

The facts relating to the other *cestui que vie* are different; but I think it is impossible to distinguish them in principle. David Henry Sherrard died in 1868, and in 1871 the late Judge Warren was nominated in his place by the then tenant. A formal notice to this effect was served on the trustees of Mrs. Malton, who was at that time tenant for life of the reversion expectant on the lease, and the renewal fine was paid to and acknowledged by them. It is contended that the nomination thus made, having been long after the prescribed six months had expired, is not binding on the defendant, Herbert William Domvile, who is now the person legally and beneficially entitled to the reversion in the demised lands, as tenant for life thereof by virtue of a subsequent limitation in the same will which gave Mrs. Malton her life estate, and consequently that the plaintiffs were not entitled to have another life nominated on Judge Warren's death. A covenant by a lessor to grant a renewal runs with the lands, and if, after the demise has been made, the reversion is put in settlement, a tenant for life in possession thereunder is the person to whom the renewal fine ought to be paid and the nomination made. Therefore, if the tenant pursuant to the terms, and within the time provided, had given notice to Mrs. Malton of the person whom he proposed to substitute as *cestui que vie* in the place of David Henry Sherrard, I should hold that he had fulfilled the condition which entitled him to a renewal, and that the non-execution of a renewal lease was of no importance. But if, as the Court has decided in the first branch of the case, the tenant's right to renew is lost on his failure to nominate a new life within six months after the death of the old one, upon what legal principle can a tenant for life, by receiving the notice and fine at a later date revive the right of renewal so as to bind interests in remainder? She takes a fine for renewal when there is no longer in existence a covenant to renew, and whatever effect this may have on her own estate, it cannot place a burden on the estates of those who came after her. In the will under which Mrs. Malton took the property, an express power is given her to grant renewals of leases let under

covenants for temporary or perpetual renewal to persons entitled thereto; and her limited interest in the land and the power thus given her are recited in the tenant's notice. The authority which she would have had to grant a renewal by virtue of her estate was not greater than what was thus expressly conferred; and it has not been argued that the tenant when he paid the fine and nominated the life, was then an object of the power. It was argued that the retention of the fine by Mrs. Malton, and the subsequent receipt of the rent, had, in some way not explained, the effect of binding the fee-simple of the lands by a renewal for the life of Judge Warren. It is no unusual thing for tenants for life to take a fine on the granting of a lease, but I have never heard that the interest of the remainderman could be prejudicially affected thereby. The receipt of rent by Mrs. Malton herself, or by those who became entitled in remainder on her death, seems to me to be wholly immaterial. If the renewal for the life of the Queen made in 1852 was valid, the rent was payable thereunder, and the tenancy during the life of Her Majesty could not be repudiated. If that renewal was invalid, the receipt of rent after the death of William Nassau Sherrard in 1879 by a remainderman, would be evidence of a tenancy from year to year created by him; but there is no authority of which I am aware for holding that it would confirm a freehold lease, otherwise invalid, made by a previous tenant for life. The only case in which the validity of a lease purporting to be granted by a tenant for life pursuant to a covenant for temporary renewal is discussed, is to be found reported at length in Lyne on Leases, and in it the Court of Queen's Bench seems to have acted on the principle I have stated.

For these reasons, I am of opinion that the plaintiffs have failed to show that they are entitled to a renewal for either of the lives claimed, and therefore that the action ought to be dismissed. I desire to add that the validity of the renewal of 1852 is not before the Court. I have no knowledge of the circumstances connected with it. The nomination of the Queen may have been made within the prescribed time; or if late, the owners of the entire inheritance may have agreed to give a renewal. These questions will perhaps arise hereafter, and it will be time enough

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to express an opinion upon them when the facts are ascertained. I wish also to say that in the view I have taken I, as well as the other members of the Court, am relieved from considering whether the failure to nominate a life in the place of William Nassau Sherrard has put an end altogether to the right of nomination, a question which is somewhat difficult, especially in view of the cases—some of them of great authority—to which our attention has been directed.

Solicitors for the plaintiffs: *Dix & Sons.*
Solicitor for the defendants: *H. A. Coffey.*

G. Y. D.

Appeal. 1900. April 25, 26. 27. June 27.

THE INCORPORATED SOCIETY FOR PROMOTING PROTESTANT SCHOOLS IN IRELAND *v.* THE QUEEN (1).

Defence Acts—Land taken for the exigency of the public service—Erection of battery and buildings—Compensation—Surrender by the Crown—Damage done to the lands—43 Geo. 3, c. 55—44 Geo. 3, c. 95—Petition of right.

The suppliants were owners in fee of lands which, in 1803, were held by J. M., as tenant from year to year, to whom the suppliants had agreed to grant a lease for three lives or thirty-one years. The Crown took possession of these lands under 43 Geo. 3, c. 55, for the purposes of military defences, and in October, 1803, several inquisitions were held to ascertain the amount of compensation to be paid for these and other lands so taken. With respect to lot 89, comprising 1A. 2R. 27P. (Irish), being part of the lands so taken, the jury found a verdict for J. M. for sums amounting to £32 16*s.* 7*d.*, the Government paying to the suppliants the rent of £4 14*s.* 6*d.* per annum, being at the rate of £3 10*s.* per statute acre. On the 4th July, 1804, the suppliants granted to J. M. and J. B. a lease of 2A. 2R. 3P. (Irish) of the lands, which comprised lot 89, for three lives or thirty-one years from the 31st May, 1803, and by deed dated the 7th April, 1809, J. M. assigned lot 89

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

to F. for the Crown for the public service for all the residue of J. M.'s interest. The land so taken was originally agricultural land, upon which the War Department erected batteries and other buildings, and the Crown regularly paid the rent of £4 14*s.* 6*d.* to the suppliants until 1896, when the Crown served notice of surrender of the land. The suppliants filed a petition of right, claiming either that the Crown should pay the rent or remove the buildings and restore the lands to their original condition, or pay compensation for the damage done; or, in the alternative, that the War Department, having acquired the tenant's interest in the lands only, were bound by the ordinary terms of the tenancy to restore the lands to their original condition on the termination of the tenancy:—

Held (affirming the decision of the Master of the Rolls, *dissentiente* Fitz Gibbon, L.J.), (1) that there was no obligation on the Crown under sect. 11 of 44 Geo. 4, c. 55, to restore the land to its original condition, or to give compensation for the damage done; (2) that the Crown were not bound by any implied obligation under the law of landlord and tenant to surrender the lands in the same condition in which they were at the time possession was taken.

PETITION OF RIGHT.

By Royal charter, dated the 24th October, 1733, George II. named the Lord Lieutenant of Ireland and certain other persons therein mentioned to be a corporation, by name of the Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland, with power to hold land and receive money, and therewith erect and support English Protestant schools.

By Royal charter, dated the 10th January, 1792, the powers of the society were enlarged, and by an order of the Privy Council, dated the 26th July, 1894, made under the Educational Endowments (Ireland) Act, 1885, the said society was reconstituted under the name of the Incorporated Society for Promoting Protestant Schools in Ireland, and all the endowments, real and personal, of the parent Society became vested in the reconstituted society.

Prior to 1792, the parent Society was seized in fee of certain plots of land in the town of Athlone, known on the maps of the War Department as plots Nos. 5 to 10, 11 to 14, and 88 and 89.

By statute 43 Geo. 3, c. 55, power was given to the Lord Lieutenant of Ireland to authorize General officers to treat and agree with the owners of any land for the possession or use thereof during such time as the exigencies of the public service should

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require; and by 44 Geo. 3, c. 95, more extended powers of taking lands, either by absolute purchase, or for the possession or use thereof during such times as the exigencies of the public service should require, were conferred on the Lord Lieutenant; but it was thereby, by s. 11, provided that in all cases when any lands should have been taken under the provisions of either of said Acts for such period only as the exigency of the public service should require, it should be lawful for his Majesty's officers, or other persons authorized, at any time before the possession should be delivered up to the owners, to take down and remove all buildings and other erections which might have been erected thereon for the public service, after the same were so taken as aforesaid, and to carry away the materials thereof, making such compensation to the owners of such lands for the damage or injury which might be done thereto, or to the soil thereof, by the erection of any such buildings, or otherwise in consequence of the same having been occupied for the public service as such officer or other persons authorized as aforesaid should think reasonable, and should be agreed on in that behalf.

In the year 1803, lot 89, along with another portion of the land, was held by John M'Daniel, or M'Donnell, from the Society, as tenant from year to year; but the society had agreed to grant him a lease for three lives, or thirty-one years.

The War Department took these lands in October, 1803, under the provisions of 43 Geo. 3, c. 55, for the purpose of erecting fortifications. An inquest was held at Athlone on the 17th October, 1803, pursuant to a warrant directed to the sheriff of the county of Roscommon, under the provisions of the Act of Defence, to inquire into the nature, value, and property of lot 89, being 1A. 1R. 27P., wanted for the public service, and to whom compensation ought to be made for the same. The verdict of the jury was as follows:—

"We find for the claimant, John M'Daniel, as follows:—For damage on potatoes, £5; for loss on his manured ground, £10 15*s.* 4½*d.*; for losses he sustained by being deprived of 1A. 1R. 27P. of his ground, Government paying the head-rent of £5 2*s.* 4½*d.* per year to the Incorporated Society, at the rate of £3 10*s.* per acre, £17 1*s.* 3*d.* Total, £32 16*s.* 7½*d.*"

There was a receipt attached to this, dated the 4th November, 1803, for £32 16*s.* 7½*d.*, signed by John M'Donnell, "in full for the compensation awarded to us by the annexed verdict."

By indenture, dated the 4th July, 1804, the Society demised to John M'Donald and James Byrne (farmers), their heirs, executors, administrators, and assigns, a plot of ground, being part of the estate called the Spa Park, containing 2A. 2R. 3P. (Irish), in the parish of St. Peter, town of Athlone, and county of Roscommon, for three lives, or thirty-one years, from the 31st May, 1803, subject to the rent of £8 16*s.* 3½*d.*

By an assignment, dated the 7th April, 1809, John M'Donnell assigned to General Fisher the plot No. 89, containing 1A. 1R. 27P., in consideration of £32 16*s.* 7½*d.*, for the residue of John M'Donnell's interest therein, in trust, for the use of his Majesty and his successors, for the public service, pursuant to the said statute, and to and for no other use, intent, or purpose whatsoever. This deed recited the two Acts of 43 and 44 Geo. 3; it recited the taking of the land and the inquisition, and the amount to be paid to M'Donnell.

By assignment, dated the 1st September, 1810, General Fisher assigned lot 89 to certain officers representing the Ordnance Department.

Between 1803 and 1810, the War Department took other plots of ground for such period as the exigency of the public service should require, and became liable to pay therefor to the said parent Society the following rents, viz.:—

For lots 5 to 10, £81 15*s.* 11*d.*; for lots 11 to 14, £31 14*s.* 8*d.*; for lot 88, 18*s.* 11*d.*; for lot 89, £4 14*s.* 6*d.* Total, £119 4*s.* (present currency).

The plots of ground, so taken, were used by the War Department for the construction of a battery, the building of which necessitated the making of trenches and mounds across the said plots, and the building of a rampart, partly composed of stone, thereon. The War Department had regularly paid the rents to the suppliants ever since.

In 1896, the War Department proposed to surrender all the plots to the suppliants, but were required by the suppliants to restore the surface of the lands to its original condition. The

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War Department ultimately elected to proceed only with the surrender of plot 89, and tendered possession thereof; but the suppliants refused to take possession, save on condition of its being restored to the condition it was in when originally taken over by the War Department, or (in lieu of said restoration) that compensation should be made by a money payment, and that a fence should be put up by the War Department to protect plot No. 89 from trespass by the adjoining occupiers. The War Department refused to restore the premises or to pay compensation. The suppliants claimed that the defendants continued liable to pay to the suppliants the rent of £4 14*s.* 6*d.* for lot No. 89.

In the alternative, the suppliants stated that, at the date of taking lot 89 by the War Department, the same was held by John M'Donnell as tenant from year to year to the suppliants, at the yearly rent of £4 14*s.* 6*d.*, and the lands were let to John M'Donnell as agricultural land, and were separated from the lands of other persons by proper boundary fences, and it was an implied term of the said tenancy that the said lands would be kept during the continuance thereof in their character and condition of agricultural land, and that the boundaries thereof should be preserved; and that at the expiration or determination of the said tenancy the said lands should be delivered up in the same character and condition, and with the boundary fences. The suppliants averred that the War Department, under the powers conferred by the said statutes, acquired the tenancy of John M'Donnell in lot 89, and a sum of £32 16*s.* 7*d.* having been assessed in manner prescribed by the said Acts as payable to M'Donnell in respect of the purchase of the tenancy, by deed, dated the 7th April, 1809, John M'Donnell assigned to Colonel Fisher his interest in lot 89, for the use of his Majesty and his successors, for the public service, pursuant to the statutes. The suppliants averred that no proceedings were ever taken by the War Department to acquire their interest, and no compensation was paid to them. The defendants paid the rent of £4 14*s.* 6*d.*, but used the lands otherwise than as agricultural lands.

In the alternative the suppliants averred that at the time of taking lot 89 by the War Department, the same was, with other lands, held by John M'Donnell as tenant to the suppliants

under an agreement for a lease, and that this agreement was afterwards carried out by the lease of the 4th July, 1804, to John M'Donnell and James Byrne of the lands therein mentioned (including lot 89), for the term of three lives, or thirty-one years, at the yearly rent of £8 16*s.* 3½*d.* (Irish), and that the defendants acquired under the assessment M'Donnell's interest.

As no valid surrender had been made, the suppliants claimed to be entitled to be paid the rent of £4 14*s.* 6*d.* in respect of lot 89. In the alternative they claimed that the defendants were bound either to restore the lands to their original condition or pay £422 10*s.* 6*d.* compensation for the injuries done to the lands for the exigencies of the public service.

As a further alternative they claimed that the defendants were bound by the terms implied in the tenancy of lot 89 so acquired to keep the said lot in its then condition of agricultural land, and to preserve the boundary fences, save in so far as the exigencies of the public service might require, and that the exigencies of the public service no longer requiring that lot 89 should be otherwise used, the War Department was bound, at the expiration of the tenancy, to restore the lot to its original character of agricultural land, and to restore the boundary fences, or to pay compensation.

The Crown by its answer denied that there was any obligation under the statutes of George 3, to restore the land to its original condition, or to make compensation. The defendants further pleaded the taking of the lands under the Act 43 Geo. 3, c. 55, and that the inquisition was held at Athlone, on the 17th October, 1803, to ascertain the compensation to be made for the possession and use of said piece of ground during the term for which the same should be required for the public service to the several persons interested therein, and to whom the same ought to be paid, and the Crown averred that the piece of ground was taken with the consent of the suppliants, who had notice of the warrants, and of the assembling of the jury to assess the said compensation, but they made no claim in reference thereto, and the said lands were taken for the purpose of erecting batteries thereon to their knowledge.

It was further pleaded with reference to lot 89, that an

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agreement was entered into in 1803 between Colonel Fisher and John M'Donnell, tenant, and the suppliants as owners of lot 89 that M'Donnell should surrender his interest in the said lot to the suppliants, and that Colonel Fisher should take possession on behalf of the Crown during such time as the exigency of the public service should require, paying therefor the yearly rent of £5 2*s.* 4*d.* (Irish) equivalent to £4 14*s.* 6*d.* sterling; and under the said agreement the lands had been held for the public service.

The case came on before the Master of the Rolls, on the 18th May, 1899, on a motion for judgment on admissions, the case being based by the suppliants on the statutes solely, when his Lordship refused the motion, but allowed the suppliants to amend their petition by adding the alternative case, claiming that in 1803 the Crown had acquired only the tenant's interest, and not the fee. The case, as amended, was heard on the 18th February, 1900, when his Lordship dismissed the petition. The suppliants appealed.

Matheson, Q.C., *Cherry, Q.C.*, and *Brunskill*, for the appellants:—

Sect. 11 of the Act of 1804 imposes an obligation on the Crown. The words "it shall be lawful" must be construed as mandatory: *Julius* v. *Bishop of Oxford* (1).

Secondly, we contend that the Crown acquired the tenant's interest only, and not the fee. Payment of rent is *prima facie* evidence of a tenancy.

We could not restrain them from erecting the batteries, and we could not ask for compensation as long as they paid the rent; but the Crown cannot surrender upon different terms from anyone else; there must be an implied covenant to give up the premises in a proper state of repair: *Meux* v. *Cobley* (2).

The Crown authorities by taking an assignment of the lessee's interest only in 1810, put themselves in the position of ordinary tenants to the Incorporated Society. The Crown when contracting with a subject is in the same position as regards liability for

(1) 5 App. Cas. 214. (2) [1892] 2 Ch. 253.

breach of contract as another subject: *Feather* v. *The Queen* (1); *Thomas* v. *The Queen* (2); *Windsor and Annapolis Railway Co.* v. *The Queen* (3). One of the obligations of a tenant is to retain lands in the same character as that in which they were demised: *Cregan* v. *Cullen* (4); *Brooke* v. *Kavanagh* (5). There is a similar obligation on a tenant to restore lands upon surrender in the same condition in which they were demised. The breach of this obligation is *waste*. But a remedy for waste lies by an action in contract as well as in tort: *Westropp* v. *Elligott* (6); Pollock on Torts, p. 330; *Attersoll* v. *Stevens* (7). Whenever an action for breach of contract would lie against a subject, a petition of right may be maintained against the Crown: *per* Blackburn, J., in *Thomas* v. *The Queen*, at p. 33.

Wright, S.-G., Campbell, Q.C., Samuels, Q.C., and *Morphy*, for the Crown:—

By section 10 of the Act of 1803, the Lord Lieutenant might take the land compulsorily if the parties did not agree, but if the owner agreed then he might purchase it. We contend that the owner agreed in this case. The Society had notice of the inquisitions being held, and appear to have been present by their agent at some of them.

Our argument is that the suppliants were entitled to compensation at some stage of the matter, but we say the Society was compensated at the date of the inquisition. By the Act of 1804, the Crown could acquire the fee; by the Act of 1803, they could not. The Society cannot claim compensation for anything done under the statute.

To the argument of an implied obligation to restore the lands there are two answers. First, the War Office was taking this under the Defence Acts, under which they were to erect fortifications for the public safety, the direct effect of which would be to

(1) 6 B. & S. 294.
(2) L. R. 10 Q. B. 31.
(3) 11 App. Cas. 607.
(4) 16 Ir. Ch. Rep. 539.
(5) 23 L. R. Ir. 97.
(6) 9 App. Cas. at p. 823.
(7) 1 Taunt. 196.

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destroy the agricultural character of the lands; and secondly, in most statutes passed for the purpose of enabling Corporations to acquire lands for public purposes, *e.g.* the Belfast Waterworks Act of 1893, there is a clause compelling them to restore any lands they do not require to their former condition. There is no such clause here.

June 27.

LORD ASHBOURNE, C.:—

This is an appeal from the Master of the Rolls, and raises some questions of interest on the Defence Acts of 1803 and 1804, and the proceedings taken under their provisions. The facts are fully stated in the judgment of the Master of the Rolls, and I only deem it necessary to refer to them, so far as may be necessary to make my meaning clear.

The Secretary of State for War, having served notice of surrender of certain lots of ground in the possession of the Department, the owners of lot 89, who are the suppliants here, filed their Petition of Right and asked for a declaration that no valid surrender can be made of the said lot as claimed, and that the current rent should be paid. They submit that under the 11th section of the Defence Act of 1804, the Department should restore the lands to their original condition or pay compensation; and under an amendment to their Petition of Right, they urge in the alternative that the Department acquired only the tenant's interest in the lands, and is therefore bound as a tenant to either pay compensation or restore the plot to its original condition.

The Department obtained possession of the lands under the Act of 1803 (43 Geo. 3, c. 55), to hold them "during such time as the exigencies of the public service should require": and before the close of the year, inquisitions were held for the purpose of ascertaining the compensation for lot 89, and other lots also taken in the vicinity of Athlone.

Under the inquisition taken in October, 1803, relative to lot 89, the Department became liable to pay the yearly rent of £4 14*s.* 6*d.*, being at the rate of £3 10*s.* per acre for the 1A. 1R. 27P. wanted for the public service. It is important to note that the inquisition was held to inquire into the "nature, value, and property" of the lands "taken for the public service and to whom compensation ought

to be paid for the same." The award was the payment of the rent I have mentioned, and there is nothing to indicate that any further or other compensation was by anyone asked for, or suggested. This yearly sum of £4 14*s.* 6*d.* has ever since been paid, and the Department no longer needing the lands wish to surrender the lot as it stands and make no further payments.

The Act of 1804 recited that doubts had arisen whether the Act of the preceding year extended to the "purchasing or taking any lands or hereditaments for permanent purposes," and then repealed and re-enacted in an amended form the provisions of the 43 Geo. 3, c. 55.

One of the alternative forms of relief suggested turns upon the construction of section 11 of the Act of 1804. That clause provides that in cases where lands have been taken for any term of years, or for such period only as the exigency of the public service shall require, the Department at any time before the possession thereof shall be delivered up to the owner, may take down or remove all such buildings or other erections erected thereon for the public service and carry away the materials, "making such compensation to the owner for the damage or injury which may have been done thereto or to the soil thereof by the erection of any such buildings or otherwise, in consequence of the same having been occupied for the public service." The suppliants rely upon this section as conferring upon them a right to compel the restoration of the condition of lot 89 to its state in 1803, or else a claim for compensation.

I cannot concur in this view. In my opinion, the section imposes no obligation upon the Crown, and was framed to give its Department a right upon giving up posssession to remove buildings erected for the public service, making compensation to the owner in the manner pointed out. The section was, I think, framed to make clear that, whenever the Crown gave up possession it would also have the power to remove buildings and erections, if it thought right, on making compensation to the owner for "damage or injury." I cannot yield to the argument of the suppliants that the words "it shall be lawful" are mandatory, and amount to a statutory enactment that the thing shall be done. I regard the words as having the primary meaning of empowering

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and not as mandatory. For this the case of *Julius* v. *The Bishop of Oxford* (1) is, I think, a clear authority. On this point I entirely concur in the judgment of the Master of the Rolls.

The alternative claim of the suppliants presented in their amendment rests upon their contention that the Department only acquired their rights to the lot 89, as assignee to tenants of the suppliants, and that whenever the Department surrender their tenant's interest in the lot they must have it in its original condition or else pay compensation. The way the matter appears to stand is this, lot 89 formed portion of a holding occupied by John M'Daniel or M'Donnell and James Byrne, and in respect of which they on 4th July, 1804, obtained from the suppliants a lease for three lives and thirty-one years from the 31st May, 1803.

John M'Daniel or M'Donnell, obtained £32 16*s.* 3*d.* under the inquisition of 17th October, 1803, the particulars of which are set out, and are of interest. The suppliants do not appear to have made any claim in respect of this particular lot 89, though they did as to other lots in its immediate vicinity. On the 7th April, 1809, General Fisher, acting for the Department, took a conveyance from M'Daniel or M'Donnell of this lot 89, described as being then in the possession of the Government, for the public service, to hold for the residue of his term "upon trust for and to the only use and behalf of His Majesty and his successors for the public service pursuant to the said statutes." This deed appears to be very loosely framed, for it does not refer to the Act of 1803, and it only mentions the Act of 1804, though it refers to the inquisition of October, 1803.

It is to be noted that when the lease of 4th July, 1804, was made to John M'Donald and James Byrne, the portion of the demised premises (which formed lot 89), was already in the possession of the Crown under the Act of 1803, and the proceedings taken thereunder. It is not easy at this distance of time to realize clearly what was in the minds of the parties. Probably it was thought prudent, as the Act of 1804 had been passed, and as the lease of 4th July, 1804, included lot 89, to take a conveyance of

(1) 5 App. Cas. 214.

the land from the lessee as was done in this deed of 7th April, 1809. But this would not displace or attenuate the fact that the Crown was then in full possession and use of the lot under the Act of 1803, for "such time as the exigence of the service should require."

The inquisition in reference to this lot 89 had been held in October, 1803. It must be assumed that it was duly and properly held, and that all parties interested made, or had an opportunity of making, any case they deemed right. An assessment of compensation was made, and I do not see that we have materials to go behind it, or assume that it was incomplete or inadequate. Other inquisitions have been proved in the case, and they go to show that each case was considered on its own facts and circumstances. I cannot see how after possession had been taken by the Crown and proceedings duly held under the Act of 1803, the suppliants could have questioned the right of the Crown to use the lands during the exigence of the service, even if the assignment of 7th April, 1809, had not been made.

The Master of the Rolls does not appear to have given any long or formal judgment on this second point, but he plainly considered that it did not afford any material which would justify his giving any decision in favour of the suppliants.

On the whole I concur with the Master of the Rolls, who could not see his way to give any relief to the suppliants, although he thought the case a hard one, and bound as I am to confine myself to the legal rights of the case, I am of opinion that his order should be affirmed and this appeal dismissed with costs.

FITZ GIBBON, L. J.:—

If we ascertain the facts in this case from the documents, drawing only such inferences as are warranted by proof; if we avoid speculation and assumption, and apply the ordinary law to the case; it appears to me that the conclusion is reasonably clear. Every one admits that the suppliants have suffered serious loss through the action of the Crown; those who hold that they are not entitled to relief acknowledge the *damnum*, but say that it is *sine injuria*, a conclusion to which a Court of Justice should never come except upon compulsion. Preferring "*ubi jus, ibi remedium*"

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as a practical maxim, I should feel little difficulty in the present case, but for the weight of judicial opinion which is against me.

My view will be best presented by stating, in order, the position of the parties, and the dealings with "lot No. 89," which is taken as a test case. The Incorporated Society, throughout the century with which we have to deal, has been and still is the owner in fee simple of the land, but until 1896 has not been in occupation of it. From the commencement of the evidence until the surrender by the Crown which occasioned the litigation, the Society was in the position of landlord, and was in receipt of rent issuing out of the land at the rate of £3 10*s.* Irish currency per Irish acre. This rent represented the letting value of the land when the Crown first took possession of it. Though the suppliants are a charitable corporation, they have as landlords all the right of private owners. As a corporation, however, they did not want to occupy this land; it was to them valuable only as rent-producing property, and they were more likely to be content with an assured rent, and less likely to seek to sell their interest for a capital sum, than an individual owner would be. So long as they received, or expected to receive, the fair annual value in the shape of a secured rent, they had no interest to compel the Crown to buy them out, or to object to, or to seek compensation for, anything done by the Crown which did not seem likely to imperil the security for the rent, which was to the Society the true measure of the value of the fee simple in reversion.

In 1803, it is conceded that lot No. 89 was in the exclusive occupation of John M'Daniel, who appears to have been one of two joint tenants to the Society, holding this lot with other land at the acreable rent of £3 10*s.* Irish. The tenure in 1803 is not proved—possibly it was from year to year, possibly under a promise of a lease—but a lease of 2A. 2R. 3P. Irish, which included lot 89, was made by the Society on July 4, 1804, to John M'Daniel and James Byrne, farmers, by which the land, described as then in their possession, was demised to them for three lives and thirty-one years concurrent, at the yearly rent of £8 16*s.* 3½*d.* Irish, equivalent to £3 10*s.* Irish per Irish acre. When that lease expired is not proved, but that the Crown in 1803 took possession of "lot 89," being part of M'Daniel's holding, and

remained in possession of it from 1803 to 1896, paying rent for it during all that time at the rate of £3 10*s.* Irish per Irish acre for the 1A. 1R. 27P. which the Crown took, is proved by the rentals of the Society, and indeed is not disputed. Whenever the lease expired, the ordinary law would fix upon the tenant in occupation, so long as he continued to pay the same rent which was reserved by the lease, all the terms of the leasehold tenancy, so far as they were consistent with the yearly tenancy which the law infers from the continued payment of rent. Whatever rights the landlord possessed againt the tenant under the lease while it lasted, would survive against the overholding tenant after it expired, until the tenancy was brought to an end. Among those rights, about the most essential to the reversioner is the right to require the land to be given up to him at the expiration of the tenancy in tenantable condition, with its identity preserved, and its boundaries defined, as they were at the date of the demise. If acts are done by a tenant, such as building, which increase the value but change the character of the holding, the landlord may sometimes restrain them, but he may assume that the tenant will keep the possession, and if they only add to the security for the rent, the landlord, by not objecting to them, does not thereby forfeit his right to damages, if the tenant, by a subsequent surrender, or by subsequent acts of dilapidation, destroys the value of the reversion, or diminishes the security for the rent.

When a petition of right has been fiated, the Crown is, *prima facie*, liable to the suppliant subject, to the same extent, and in the same manner, as a private defendant, and it lies on the Crown to prove exemption. The case of the Crown here is that the use and occupation of the land in question were acquired under a statutory authority, the terms of which exempted the Crown from liability for destroying the value of the reversion, but at the same time enabled the Crown to surrender the tenancy, and to put an end to its liability to the rent, without incurring any liability by way of compensation or damages. This is a startling result, and it has, in my opinion, been reached by an erroneous construction of the dealings with the land. Upon the documents, taken in connexion with the continued payment of the rent, I hold that the Crown never acquired, paid for, or had, any estate or interest in lot 89,

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except M'Daniel's term. It follows that unless the statutory authority entitles the Crown to commit waste without paying for it, and to surrender the wasted holding without liability, the suppliants are now entitled to damages for the loss sustained in having their land surrendered to them in a worthless condition. I concede that the use and occupation of the land were under the Defence Acts, and that the tenure of the Crown was determinable by surrender whenever the exigency of the public service for which it was taken ceased. I concede that, whenever that exigency ended, the Crown was no longer bound to keep the lands, or to pay the rent; but I fail to find, either in the Defence Acts, in the Prerogative, or in the ordinary law, anything to exonerate the Crown, as the occupying tenant of land held at a rent, from the liability which falls upon every such tenant, of paying damages to the landlord at the end of the tenancy, if the land is then in a state of waste. The landlord's remedy is not lost, when his land is thrown back upon his hands in a worthless condition, by his having continued to receive his rent for any length of time upon the faith of the continuance of the tenancy. The whole course of dealing between the Society and the Crown, from 1803, proves that the Crown undertook to pay the rent, and that the Society understood that it would be paid, so long as the battery stood for which the land was taken. It was only in 1896 that it occurred to some economist in the War Department that the Exchequer might save £4 14*s.* 6*d.* a-year by making the landlord of lot 89 take worthless stones from the tenant, in place of the land which had been demised at that rent in 1804. The documents, to my mind, conclusively prove that M'Daniel's tenancy only was acquired by the Crown. On the inquisition of October 7, 1803, M'Daniel was the only claimant. His identity with John M'Donald, the lessee of 1804, is admitted. In October, 1803, he was the occupier in severalty of lot 89, at the rent of £3 10*s.* Irish per Irish acre. He was paid £15 15*s.* 4½*d.* for damage to his potatoes and to his manured ground, which proves that the Crown took possession in 1803, *before the lease of* 1804. He was paid £17 1*s.* 3*d.* for loss "by being deprived of 1A. 1R. 27P., *Government paying the head rent* of £5 2*s.* 4½*d.* per annum to the Incorporated Society, being at the rate of £3 10*s.* per acre." This is, in express terms, a

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contract by "the Government" to pay a proportionate part of the tenant's rent, in respect of so much of the tenant's holding as is taken from him. The Incorporated Society was not a party to the inquisition, it was left in undisturbed receipt of the head-rent. At law, until an assignment was executed M'Daniel remained tenant, and "the Government" was the equitable assignee of a part of his holding, at an apportioned rent. So long as the Society accepted the rent, the Crown was content to have the use and occupation as tenant. If the Society had claimed compensation, or had sought to determine the tenancy, which in 1803 appears to have been only a tenancy from year to year, it would have been time enough to deal with the reversion in fee. The Act of 1803 empowered the Crown to take limited interests. The Act of 1804 shows that it was even doubtful whether the previous Act enabled the Crown to acquire a permanent interest. The other inquisitions which are in evidence show that when the fee-simple, or a long term, was required, or when the interest of the reversioner was injuriously affected, the Crown either paid compensation, or bound itself to continue the payment of the rent for a specified term. The inquisitions on lots 78 and 79, giving compensation for changing a road; on lot 16, providing for payment of rent to the landlord, without limit of time, and of compensation *to the tenant* in the event of surrender to him, to enable him to rebuild improvements removed *under the direction of the landlord*; on lots 48 and others, providing for the payment of the rent reserved under a lease for ever; on lot 91, providing that the Government shall on giving up the lot leave it in its original state; on lots 81 and 87, providing compensation for a gravel hill, and for rent in perpetuity for land taken direct from the Society for a ditch and rampart; are all instances to prove that whenever the reversioner was affected he was made a party to the inquisition, and that whenever injury to the value of the reversion, by waste or otherwise, was contemplated, even as consequent upon a possible surrender, compensation was provided. In the case of lot 89, nothing of this kind was done, because the tenant's interest only was taken, and because there was no injury to the reversion, inasmuch as the land was taken to form part of the site of a permanent battery, the erection of which would permanently secure

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the rent of £3 10*s.* Irish per acre, which "the Government" undertook to pay. It is most important to observe that the lease which vested the legal tenancy in M'Daniel was executed after the inquisition, for this proves that the reversion was still in the Society, and that "the Government" became tenant on the terms of the lease. The assignment of April 7, 1809, from M'Daniel to General Fisher, followed, and proves conclusively to my mind that the Crown acquired nothing more in lot 89, than the tenant's interest as part of the leasehold of 1804. It proves equally conclusively that the payment of the rent under the terms of the inquisition was not by way of compensation to the Society, but was by way of indemnity to the tenant of the rest of the holding, in respect of that part of lot 89 which was assigned by him to the Crown "for and during the rest, residue, and remainder of his term" under the lease of 1804. General Fisher's assignment to the Ordnance Officers of September 1, 1810, is a dealing by "the Government" with its leasehold tenancy, subsisting at that date. I test the liability of the Crown on the surrender in 1896, by asking—What would have been the position, if the Crown had attempted to surrender before the lease expired? There is ample proof in the rentals of the acceptance of the Crown by the Society as assignee of part of the leasehold, occupying in severalty at an apportioned rent, upon the terms of the lease. So long as the lease lasted, and at its expiration, the Crown could have had no defence to an action for waste, or for not giving up in tenantable order. The Crown cannot, in my opinion, have acquired any new immunity by the expiration of the lease, for the land has ever since been simply overheld upon the same terms.

I have dealt with the case, for clearness, in general terms. In speaking of "the Crown," I have included the several officers and departments who, from 1803 to the present, have represented the Crown. I have dealt with the evidence as to lot 89 alone, because it has been admitted that the cases of the other lots mentioned in the petition are so similar as to make the case of lot No 89, and of the £4 14*s.* 6*d.* rent issuing out of it, a test case to determine the rights of the Society to the rental of £119 4*s.* hitherto believed to be secure, which will be lost if the Crown can, without any liability to damages, surrender the property out of which it issues

in a condition in which it is worth little or nothing. I have dealt only with the view of the case which is presented by the amended petition, though a fiated petition of right is, by practice, entitled to some degree of immunity from being defeated on a pleading point. But I think a great deal might have been said to sustain the view that, where "the exigency of the public service" for which land was taken involved the permanent destruction of its value as rent-bearing property for any other purpose, it could not be surrendered under the Defence Acts. I do not believe that land could be taken at an agricultural rent under those Acts, used by the Crown for a year or two as a spoil bank, or as a quarry or gravel pit, and then surrendered, on the ground that "the exigency of the public service" for which it had been taken was at an end. When the exigency of the public service has required the destruction of private property, the exigency of public justice requires its restoration as a condition precedent to returning it to the owner. I hold that this could not be done here without proof that the rent was paid as the consideration for the use made of the fee and inheritance. In this case there is no evidence whatever that it was so paid. It was paid by the Crown for the use of the land as assignee of a terminable tenancy subject to a rent, and liability to pay damages for waste is an incident of that tenancy. The amendment which was made in the petition raised the case upon which I rest the suppliants' right to relief. I regret that we have no means of knowing how the Master of the Rolls dealt with this view of the case, as the only judgment which we have from him was delivered before the pleading was amended. I agree that the case is not within the Act of 1804, section 11, which is a provision in favour of the Crown to enable it to remove buildings, paying compensation for consequential damage. But I wholly fail to see how that section exonerates the Crown from the liabilities of ordinary tenants in other cases. The enactment seems to me to imply that, except when acting under it, the Crown is subject to the ordinary law of landlord and tenant.

It is beyond question that the acts done here, though authorized by the Defence Acts, amounted as between landlord and tenant to waste, and as between man and man to the conversion of agricultural land worth £3 10*s.* Irish per acre, into so much

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unproductive property, useless for any purpose except that of marking the perishable nature of human constructions. The land having been rendered by the tenant worthless, incapable of identification, and utterly transformed, upon its being surrendered by the tenant in order to put an end to the rent, the suppliants are, in my opinion, entitled to an inquiry as to the amount of pecuniary damage which they have sustained by the breach of the terms of the tenancy. The measure of that damage should be fixed at the difference between the capital value of 1A. 1R. 27P. Irish, of land worth £3 10s. Irish, per acre, and the capital value of lot 89, occupied as it is by the old battery.

Finding as a juror that all parties in 1803, and ever since up to 1896, acted on the assumptions — 1, that the Incorporated Society's interest was worth £3 10s. Irish, per Irish acre; 2, that that rent should be paid by the Crown so long as the battery lasted; and 3, that the battery would occupy its site for ever; equity appears to me to be satisfied by an assessment of damages upon the principle which I have stated, and, in my opinion, in no other way can "right be done" as directed upon this petition.

WALKER, L.J. :—

The suppliants in this case are the owners in fee of certain lots of ground in the possession of the War Department at Athlone, taken for the public service, and which the Secretary of State for the Department served notice to surrender in 1896 and 1897.

The suppliants seek a declaration that no valid surrender can be made of lot 89, with which only the petition of right is conversant and that the current rent should be paid, and that by virtue of the 11th section of the Defence Act of 1804, the War Department is bound to restore lot 89 to its original condition, and in the alternative by an amendment made at a late stage of the action, they submit that the Department acquired only the tenant's interest under the suppliants in the plot 89, and is bound, by reason of the obligation attaching on a tenant, in favour of the suppliants, to restore the plot to its original condition, or pay compensation.

The War Department obtained possession of the plot under the provisions of the 43 Geo. 3, c. 55, which became law on the

11th June, 1803. It recites the expediency of enabling the Lord Lieutenant of Ireland for the time being to procure ground which might be wanting for encamping His Majesty's armies and for erecting batteries, beacons, and other works which might be deemed necessary for the public service, and to carry out this it provides in its 10th section that it should be lawful for the Lord Lieutenant to authorize any General officer or other person commissioned for the purpose to mark out any piece of ground wanted for the public service, and in case of the refusal or inability of the owner to agree for the possession or use thereof during such time as the exigence of the public service should require, to require two or more Justices (amongst others) for the county wherein the place should be to put His Majesty's officers into immediate possession of such piece of ground, and that the Justices should issue their warrant accordingly, and also issue their warrant to the sheriff to summon a jury to inquire into and ascertain the compensation which ought to be made for the possession or use of such piece of ground, during the time for which the same should be required for the public service, to the several persons interested therein, and to whom the same ought to be paid, and it then provides for payment of the compensation.

It appears that under this Act, Brigadier-General Fisher was put into possession, on behalf of His Majesty, of the required plots, both those belonging to the suppliants and their tenants and to others, and on the 17th October, 1803, numerous inquisitions were held in Athlone, for the purpose of ascertaining compensation.

So far as I know, only a few of those inquisitions are in evidence, but the suppliants in the 5th paragraph of the Petition of Right, state that the War Depaartment took all the said plots of ground for such period as the exigency of the public service should require, and became liable to pay therefor to the Society the following yearly rents:—For lots 5 to 10, £81 15*s.* 11*d.*; lots 11 to 14, £31 14*s.* 8*d.*; lot 88, 18*s.* 11*d.*; and for lot 89, £4 14*s.* 6*d.* It will appear that other lots of ground belonging to the Society, including at all events 78, 79, 80, 81 and 87, were also taken. We have the certified copy of the inquisition taken in respect of lot 89, which is described as an inquest "to try and inquire into the nature, value, and property of the lot 89, being 1A. 1R. wanted for

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the public service, and to whom compensation ought to be paid for the same." The jury found for John M'Daniel the tenant, for damage and loss and deprivation of ground, three sums amounting to £32 16*s.* 7*d.*, "Government paying the head rent of £5 2*s.* 4*d.* per year to the Incorporated Society, being at the rate of £3 10*s.* per acre." This is equal to £4 14*s.* 6*d.* sterling. We are only in this action concerned with this lot 89, though it is stated that notices to surrender the other lots were also served, and that the result depends on the decision in the case of 89, which is the only one in which a conveyance appears, and therefore was naturally selected. The entries in the Society's books show that this annual sum of £4 14*s.* 6*d.* was continuously paid from thence by the War Department, beginning with the date of October, as if this were a payment accruing under the inquisition, and the 5th paragraph of the petition treats all the payments in respect of the lots specified as so accruing, describing them as satisfaction against the Society for the use and possession of the lands; one of the rent receipts describes the payment as made in respect of part of Byrne and M'Donnell's holding. In another it is treated as a bulk rent and in others as a separate rent of £4 14*s.* 6*d.* payable by the Crown.

The War Department treated the transfer of the possession to Fisher as sufficient title under the Act of 1803. That Act does not contemplate the making of a conveyance, and we find Fisher afterwards, by deed of 1810, transferring various lots of which he had such possession to Ordnance officers of the Department.

The same deed shows also that the Society were parties to the inquisitions in respect of several other lots as well as those mentioned in the 5th paragraph of the petition. For instance, one in respect of lot 78, thirty-seven building lots for which the Society was awarded £2 10*s.* per lot per year; another in respect of lot 79, half-an-acre and twenty perches, for which the Society was awarded £4 11*s.* per annum; and there was a further inquest of same date under which the Society was awarded in respect of lots 78 and 79, a bulk sum of £19 10*s.*, value of houses and materials thereon.

Another inquisition awarded to the Society in respect of lot 80

an annual rent of £20 for three acres of glebe ground. A further inquisition awarded to them for lot 81 an annual rent of £2 3*s.* 9*d.*, being £3 12*s.* per acre for the ground taken, and also for the loss of a gravel hill, an annual rent of £5 13*s.* 9*d.* The last inquisition in favour of the Society differs in form, as it awards to them £37 18*s.* 9*d.* annually for lot 87, "being at the rate of £10 per acre per annum, for so long as Government might occupy it," and that in case Government should give up said ground they should still pay said Society for ever thereafter the annual sum of £2 10*s.* for and in lieu of the ditch and rampart, and also for such ground as would be stripped, and then by this deed of 1st September, 1810, General Fisher assigned all those lots with the works of defence and buildings erected thereon, to the Ordnance officers, to hold for such time as the exigence of the public service should require in trust for His Majesty. The conveyance shows that works of defence had been erected on the lots or some of them before 1810, under a title which is referred to in inquisitions under the Act of 1803, and there is no trace of any new step having been taken under the Act of 1804, and it is assumed that works of defence and buildings could be erected under the title given by the inquisitions, *i.e.* a title to endure for the period the public service required. It thus appears in all those instances that the interests of the Society were measured by annual payments, save in the one case specially mentioned, and no conveyance to Fisher was considered under the Act of 1803 to be necessary, though the erection of batteries, &c., on ground taken was contemplated by the Act.

The Act of 1804, which became law on 28th July, was passed for the purpose of removing doubts as to whether land could be purchased for permanent purposes. It repealed the former Act, save as to commissions already granted, and it enabled the War Department to purchase lands absolutely, or the possession or use of them for such period as the exigence of the public service might require, and the jury were directed to find the compensations to be paid according to the nature of the purchase. This Act appears to contemplate a conveyance when there was a competent owner. Lot 89 formed portion of a plot of 2A. 2R. 3P., of which John M'Donnell and James Byrne had obtained a

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promise of a lease from the Society; and on the 4th July, 1804, a lease was granted to them of this plot, including the area of lot 89, for three lives, and thirty-one years from the 31st May, 1803, at the yearly rent of £8 16*s.* 3*d.* The acreable rent would appear to be £3 10*s.* John M'Donnell was the person to whom £32 16*s.* 7*d.* was awarded by the inquisition of 17th October, 1803, under the name of M'Daniel, and on the 7th April, 1809, General Fisher appears to have required a conveyance from him; and accordingly, by deed of that date, he assigned to Fisher lot 89, described as containing 1A. 1R. 27P., formerly in the possession of M'Donnell, but then in the possession of Government for the public service, to hold for the residue of M'Donnell's term and interest therein in trust for His Majesty for the public service. The consideration for this assignment is the sum assessed, under the Act of 1803, on the 17th October, 1803.

On the 1st September, 1810, General Fisher assigned to the officers of Ordnance same lot 89, together with the works of defence and buildings erected thereon, to hold for the residue of M'Donnell's term in trust for his Majesty for the public service. The deed of the 7th April, 1809, and two deeds of the 1st September, 1810, erroneously treat the proceedings and inquisitions to have been taken under the Act of 1804 instead of that of 1803.

These are the facts which raise the two questions which we have to decide. I am clearly of opinion that the 11th section of the Act of 1804 does not confer any right upon the suppliants to compel the restoration of the condition of the soil of lot 89, or give any claim for compensation. It is a section not intended to impose any obligation on the Crown under the words "it shall be lawful," but to confer a right on the Department before the possession was given up to remove and take down all buildings and erections erected for the public service, making compensation to the owner for the damage or injury done to the lands or soil by the erection of any such buildings, or otherwise in consequence of the same having been occupied for the public service. This is an alternative provision for the giving up of the lands as they stood at the expiration of the limited period or the termination of the exigency of the public service; and it was an enabling provision,

and not one imposing an obligation. In fact, the 11th section furnishes, in my opinion, a strong argument against the suppliants; because it proceeds on the assumption that lands might have been taken under the Act of 1803 for "any term of years, or for such period only as the exigency of the public service shall require," and that "buildings or other erections" might have been "built or erected thereon, for the public service," and yet that the lands might be given up with such works on the lands.

The other point was more strongly pressed before us, viz. that the War Department were but tenants of the Incorporated Society, with consequential obligations. We have not the benefit of the Master of the Rolls' written opinion on this part of the case; but he appears to have considered when the case came before him on the amended pleadings that there was no reason shown by the alternative case for an alteration of his previously expressed view. I am of opinion that he was right.

When the lease of the 4th July, 1804, was made to John M'Donnell and James Byrne, 1A. 1R. of the premises included in that lease were in the possession of the Crown, under the title acquired under the Act of 1803. In fact, the Act of 1804 had not become law when the lease was made, and the inquisition of 17th October, 1803, had purported to settle the compensation for the taking; but inasmuch as the Society included lot 89 in their lease, thus purporting to give a title to M'Donnell and Byrne even in lot 89, it was considered advisable in the year 1809 to get, especially as the Act of 1804 had then passed, a conveyance of lot 89 from the lessee, which was done by the deed of the 7th April, 1809. I think, however, that the right of the Crown to the use and possession of the lot 89 during the exigencies of the public service would have continued even if the conveyance of 1809 had not been made; that lease, however, has long determined.

It was probably considered when the inquisitions of October, 1803, were taken, that the use and possession by the Crown for the public service would not be of long duration; and it may also have been considered then that permanent works could not, in most cases, be erected on the lands, though the Act of 1803 authorized it, and for that reason the Society was deemed

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sufficiently compensated by the provisions for the payment of rent. It is, I think, impossible to say, considering the number of instances in which the rights of the Society were dealt with, that the jury were not, on the materials before them, assessing compensation to the Society for the use and possession of their ground, and all the dealings with it authorized by the Act; and it is no answer to say that in the events which happened sufficient compensation was not made. Such a result happens in numerous cases of compulsory taking and consequent assessment. There are three instances appearing on the inquisitions, in which the jury awarded something more than annual rent or payment where the facts, as brought before them, seemed to justify it; for instance, in the case of lot 87, which was 3A. 9R. 7P. of Society ground, the jury awarded to them £37 18*s.* 9*d.* annually, *i.e.* £10 per acre, for so long as Government might occupy it, "and, if they gave up, then £2 10*s.* per annum for ever in lieu of ditch and rampart." The same exceptional dealing appears in the inquisitions for lots 16 and 91. The annual payment by the Crown also, in respect of lot 87, runs from the date of the inquisition.

It thus appears to me that it must be inferred that the Crown acquired against the Society a right to the use and possession of lot 89 during the exigency of the public service, including the right to erect military works on it, and I cannot think that the Society could at any time have obtained an injunction, or asserted any right, against the Crown in respect of the erection of the military works.

The consequential right to give up when the exigencies of the public service ceased follows; and, therefore, in my opinion, the 11th section of the Act of 1804 was the only ground on which a claim to relief could be founded by the suppliants, and that failing them, I think, though the result works out hardly to the Society, that the Master of the Rolls was bound to decide as he did, and that the appeal must be dismissed.

HOLMES, L.J.:—

As we are considering in this case the consequence of transactions that took place nearly a hundred years ago, it might be expected that there would be some difficulty in ascertaining the

facts; but the documents produced from the Public Record Office, and the well-kept books of the Incorporated Society, have made this task comparatively easy.

At the beginning of the present century, and for some time before, the Incorporated Society owned in fee-simple lands near the town of Athlone, called the Ranelagh estate. Some of these lands were in the hands of tenants, amongst whom were two persons named Byrne and M'Daniel, M'Donnell, or M'Donald. The rentals of the Society show that these men held jointly the same holding at the annual rent of £7. On the 4th July, 1804, the Society executed a lease to M'Donald and Byrne of part of the Ranelagh estate, containing 2A. 2R. and 3P., to hold for three lives, and a concurrent term of thirty-one years, beginning on the 1st May, 1803, at the annual rent of £8 16*s.* 3½*d.* I have little doubt that the lands comprised in this demise were the holding for which the annual rent of £7 had been previously paid; and the lease was probably executed in pursuance of an arrangement that had been acted on from the date fixed for the commencement of the term. On the 11th June, 1803, at a time of great national peril, the Royal assent was given to a statute, the object of which was to enable the King to provide more effectually for the defence and security of the realm during the war in which the country was then engaged. Amongst the powers thereby conferred was one which enabled the King or the Lord Lieutenant of Ireland to authorise persons commissioned for the purpose to survey and mark out any piece of ground wanted for the public service, and to treat and agree with the owner, or anyone having an interest therein, for the possession or use thereof during such time as the exigence of the service should require. It was provided that in the event of the owner or any other person interested being unable or unwilling to agree, the persons commissioned as aforesaid might require two or more justices of the peace to put the King's officers into possession, and to cause an inquiry to be held by a jury for the purpose of ascertaining the compensation that ought to be made for the use thereof to the several persons interested therein.

As soon as this statute became law, immediate steps were taken for the purpose of putting the foregoing provisions in force; and

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amongst the pieces of ground in Ireland surveyed and marked out in the manner prescribed were several lots on the Ranelagh estate. The petition of right now before the Court is only conversant with one of these lots, No. 89, as it was called at the time; but counsel have accounted for this litigation, which would otherwise seem somewhat unreasonable, by describing it as a test case, the decision of which will ascertain the respective rights and liabilities of the Society and of the Crown in relation to other property of considerable value.

On the 17th October, 1803, a jury assembled in Athlone, pursuant to a warrant directed to the sheriff of the county, to inquire into the nature and value of lot No. 89, being one acre and one rood in quantity, wanted for the public service, and to whom compensation ought to be made for the same. This appears by the certificate produced from the Public Record Office, signed by two Justices and Deputy Governors for county Roscommon, certifying to the Collector of the King's revenues for the district of Athlone, the several matters required by the statute; and I am bound to assume that all the preliminary steps were duly taken for the purpose of putting the King's officers in possession, and for ascertaining the compensation to be paid therefor. The jury found for John M'Daniel (who signed the receipt for payment as John M'Donnell) £5 for damages to potatoes, £10 15*s.* 4½*d.* for damage to his manured ground, and £17 1*s.* 3*d.* for losses sustained by his being deprived of 1A. 1R. 27P. of his land, Government paying the head rent of £5 2*s.* 4½*d.* per year to the Incorporated Society, being at the rate of £3 10*s.* per acre.

There is no room for doubt that lot No. 89 was portion of the land demised by the lease of 1804. This is shown by a receipt given on the 25th April, 1807, by the agent of the Society to the Collector of the Athlone District for £2 11*s.* 2*d.*, one half year's rent, described as due out of part of M'Donnell and Byrne's holding. By deed of the 7th April, 1809, John M'Donnell assigned to Brigadier-General Fisher lot No. 89, to hold during the residue of M'Donnell's term therein, for the use and behalf of the King and his successors for the public service; and by another deed dated the 1st September, 1810, Brigadier-General Fisher assigned the same lot to His Majesty's officers of Ordnance. A rental of the

Society for 1822 shows the full rent reserved by the lease as a single rent payable by M'Donnell and Byrne; while in the next rental forthcoming, being that for the year 1832, this rent is divided, a portion of it representing in English money £5 2*s.* 4*d.* Irish, being payable by the Crown, and the remainder by the original lessees. I ought perhaps to say that I have not inspected these rentals myself; and I believe that there is a slight discrepancy in the amount of the rent; but I have taken the foregoing abstract from the statement of counsel, who, I presume, have satisfied themselves of its accuracy. There is no direct evidence of the time at which the fortifications now standing on this piece of ground were erected; but a comparison of the description of the parcels assigned by the deed of 1809 with the similar description contained in the deed of 1810, suggests that in the interval a considerable quantity of building had been placed on the premises. But whatever was the date of the completion of the project, and however much the original plan was altered during its progress, it must be assumed that the land was taken for the purpose of erecting, in the words of the preamble of the statute, "batteries, beacons, and other works that may be necessary for the public service."

It does not seem to have been the intention of the Act that the Crown was to acquire an estate in the premises taken thereunder, or that its title was to depend upon grant or conveyance. Upon being put into possession by the warrant of the Justices, and upon payment of the compensation ascertained by the jury, the King's officers were entitled to occupy and use the lands for such time as the exigence of the service should require; and as soon as the period of exigence ceased, of which I presume the Crown was to be the judge, they were to restore them to the persons who would then own the estate, that would carry with it the right of possession. It is clear that compensation could and ought to have been given to every person interested in the premises who would sustain immediate or prospective loss; and although it might be difficult to assess the amount to be awarded where the nature of the works and even the period of occupation were doubtful, jurors are entrusted with and perform successfully as difficult duties as this every day. The jurors under the Defence Act were

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no doubt assisted in their task by the power to give compensation by way of an annual payment in substitution for or in addition to a lump sum—a power which they seem to have often exercised. The scope and object of the Act of 1803 will be better understood by a reference to a statute of the following year. Although the latter is called an amending Act, it repealed altogether the previous enactment in so far as it related to the taking of lands, and replaced it by a new set of provisions. The object stated in the preamble was to remove doubts as to the power to purchase lands for permanent purposes; and without referring to its sections in detail, it is sufficient to say that while it preserved the power to take the possession and use of land for such time as the exigence of the public service might require, it also authorised the Crown to acquire land either for a term of years, or by the purchase of the entire estate therein. It is clear that lot No. 89 was taken in the first instance to be used during the exigence of the public service. It is equally clear that it was within the authority and duty of the jury to award compensation for the loss that would thereby be sustained not only by the tenant in possession, but also by the Incorporated Society. In other inquisitions relating to other lots forming part of the Ranelagh estate, held on the same 17th October, 1803, compensation in different forms was given to the Society. In the case of lot No. 89, it was evidently conceived that the Society would be sufficiently recompensed by its continuing to receive the rent. Whether M'Donnell or the Crown was in possession, the interest of the Society in the holding during the continuance of the lease subsequently executed, and probably then agreed to, was the rent thereby reserved which amounted to £3 10*s.* per acre. Therefore the jury directed that during the period of use by the Crown, the latter should pay to the Society an acreable proportion of M'Donnell's rent.

It has been suggested during the argument that what happened in 1803 was a surrender of part of M'Donnell's holding, and the creation of a new tenancy between the Society and the Crown. This is, however, inconsistent with the receipt of 1807, the rentals of the Company, and the assignment by M'Donnell in 1809. The only circumstance that gives it countenance is that the rent was paid by the Crown on the 17th April and 17th October, instead of on the

1st May and 1st November, the gale days named in the lease. But this arose from the fact that the inquisition was held on the 17th October; and for the sake of convenience the rent was apportioned up to that day. For some reason that cannot now be explained, the Crown determined to acquire the leasehold interest, as it was entitled to do under the statute of 1804; and this was carried out by the assignment of 1809. The effect of this was to bind the Crown to hold lot No. 89 during the remainder of the term; but I cannot find any trace of a purchase of the reversion of the Society, or of any grant made thereof to the officers of the King.

It may be assumed that the term has now expired. It appears from an entry in the rentals of the Society that only one *cestui que vie* was alive in 1836; and he would now be more than a hundred years of age. The Crown has served notice of surrender, and it is not alleged by the Society that the lease is still subsisting. On the contrary the case of the suppliants assumes that the term has come to an end, but asserts that the Crown is not entitled to oblige them to accept possession of the land covered, as it now is, with fortifications, and traversed by deep trenches.

The legal position of the Society is presented in a double aspect:—1, as resting on the provisions of the 11th section of the Act of 1804; and 2, as depending upon the ordinary obligations of a lessee to his lessor. The 11th section applies to cases where land was taken either while the exigence of the public service required, or for a term of years; and therefore is applicable to the present case. But I fail to see how it helps the suppliants. It provides that it shall be lawful for the King's officers at any time before possession shall be delivered up to the owner to take down and remove all such buildings and erections as shall have been built or erected thereon for the public service, and to carry away the materials thereof, making compensation to the owner for the damage or injury which may have been done to the land or soil by the erection of the buildings or otherwise in consequence of the same having been occupied for the public service. The Incorporated Society contends that this provision imposes upon the Crown the obligation before surrendering possesion to restore the ground to its original condition or to make

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compensation for the loss arising from its altered state. An enactment of this kind would, no doubt, be just and reasonable; but I am unable to find it in the words of the 11th section. The object seems to be to give a right or privilege to the Crown, not to impose on it a duty. At all events, the language is, I think, incapable of any other construction. Buildings or other erections placed on land by the tenant or occupier becomes part of the land, and cannot be taken away without the consent of the owner of the inheritance. The 11th section gave the Crown the right, which it would not otherwise have had, to remove the buildings and to appropriate the materials of which they were composed. The clause relating to compensation is somewhat strangely expressed; and if it occurred in another connexion might be capable of including all kinds of damage and injury arising from the mode of occupation; but it is made incidental to the act of removal and cannot be separated therefrom. It is the function of a Court of Justice to interpret the provisions contained in a statute—not to account for apparent omissions from it. I may, however, point out that upon the inquisition the jury was at liberty to award compensation for the kind of damage of which the Society now complains; and, indeed it appears from one of the documents given in evidence that upon an inquisition held on the same day as that relating to lot No. 89, there was awarded to the Incorporated Society in respect of lot No. 87, in addition to the rent of £10 per acre per annum, for the period of occupation by the Crown, the further annual sum of £2 10*s.*, to commence when the ground would be given up by the Government, and to be payable for ever thereafter in lieu of a ditch and rampart, and also for such ground as would be stripped. It cannot therefore be said that the Legislature authorised the taking of private property without providing machinery for compensating the owner, although in some cases such machinery may have proved inadequate or ineffective.

The alternative case presented by the suppliants in their amended petition can be stated in a few sentences. Lot No. 89 was in 1803 agricultural land, which might in time become suitable for building ground. It is said that the battery and other works that have been placed on it by the Crown make it now useless for every purpose; and that a large expenditure is required before it can have any

value. I assume that if M'Donnell had remained lessee and had effected a similar transformation of the demised premises, he could have been ordered by mandatory injunction to restore them to their former state, or pay the Society compensation for the loss arising from the change. Apart from the express covenants in a lease, the lessee is under an implied obligation not to alter essentially the character of the holding to the detriment of the reversioner; and this obligation can be enforced by action. But the ground of this—as of every other action—is legal injury, a breach of contract, or a wrong springing from contract, or a pure tort. Here, however, the Crown was not a wrong-doer. Its acts were authorised by statute; and although damage to the Society may have been the consequence, it was *damnum sine injuria*. I am, therefore, of opinion that the suppliants must fail on the amended, as well as on the original, petition. The result is, no doubt, unfortunate; and I should have been glad if I could have come to a different conclusion; for the case seems to me to be one in which the application of strict legal right produces unexpected hardship.

Perhaps the Incorporated Society may not be without redress; but I fear that it must be sought elsewhere than in a Court of law.

Solicitors for the suppliants: *H. T. Dix & Son.*
Solicitor for the Crown: *Sir P. Coll.*

R. D. M.

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May 11, 14, 15, 16. June 20.

Mortgage—Priority—Compromise of litigation in Probate Court—Sum of money paid to enable will to be proved—Costs of suit—Mortgage for costs.

C. N. B., by his will, left all his property to trustees upon trust that the rents and profits of his real estate (other than the house and lands of A.), and the profits of his personal estate, should be applied in payment of the charges that might affect his real estate, and all other his debts, his funeral and testamentary expenses, and all legacies and annuities given by his will, and subject thereto he directed the trustees to accumulate for twenty years the profits of his personal estate and the rents of his real estate (other than the lands of A.) so far as not required for the purposes aforesaid. The testator devised the house and demesne of A. to his brother J. L. B. for life with remainder to his eldest son for life with remainder in tail male; remainder to his brother B. W. B. for life with like remainders; with remainder to his brother C. A. B. for life with like remainders. The trusts of the accumulating fund were to raise £20,000 for buildings at A., then to pay to each of his brothers B. W. B. and C. A. B., £5000 at such time as the trustees should think fit. He left his sister Mrs. M. an annuity of £200 a-year for her life, £100 a-year to the Protestant church at Ballygar, and £10 a-year to the Protestant Orphan Society. Subject to aforesaid gifts, and after payment thereof, he directed his trustees to raise for W. H. N. B. £10,000 out of the accumulating fund, and if that was insufficient, out of his estates which he charged therewith, to be paid to him at the age of thirty. Subject thereto, the accumulating fund was to be laid out in the purchase of real estate, and settled upon the same trusts as the lands of A.

C. N. B. having died, his widow disputed the will in a suit of *B.* v. *B.*, which resulted in the will being condemned. A new trial was directed by the Court of Appeal. When the case was coming on for a second trial, a compromise was effected, which was embodied in a consent, and confirmed by a private Act of Parliament. By the terms of the consent and the private Act, the estates were to be charged with £25,000 for W. H. N. B., a minor, in addition to the £10,000 given by the will, not to be raisable till the minor attained age; £11,000 was to be paid to Mrs. R., the testator's widow, who had married a second time, and £11,000 to K., her solicitor, for costs. The amount to be spent on building was reduced to £5000; and the costs and

(1) Before Palles, C.B., and Fitz Gibbon and Holmes, L.JJ.

expenses of the executors and trustees were to be paid out of the assets, and in case the personal estate was not sufficient, the trustees were empowered to raise the amount by mortgage of the fee of the real estates (other than A.). The two sums of £11,000 were paid to Mrs. R. and to her solicitor, and other sums were paid out of the personal estate, which ultimately proved insufficient for payment in full of the costs. Two mortgages for costs were charged on the estates by the executors for £6000 and £6500. On the minor coming of age in 1897 a petition was presented to the Land Judge's Court to raise his charge, and a receiver was appointed. When he had collected a year's rent an application was made to the Court for an order fixing the priorities in which the rents were to be paid:—

Held (varying the decision of Ross, J.), that the order in which the interest should be paid was (after the annuity of £1000 a-year for Mrs. R., the priority of which was not disputed)—(1) the arrears of the three annuities, ranking *pari passu*, and charged on all the lands except the lands of A.; (2) the accruing gales of the annuities; (3) the £25,000 charged on all the lands for the minor; (4) the two mortgages for costs, charged on all the lands.

C. N. BAGOT, by his will dated the 7th September, 1876, devised and bequeathed all his real and personal property to Bernard William Bagot and Joseph Arthur Holmes, his trustees and executors, upon trust that the rents, interest, and annual proceeds of his real and personal estate (other than the house and demesne lands of Aughrane), and the proceeds of such chattels as might be sold pursuant to his will after his death, should be first applied in payment of the interest as the same should become due upon any charges that might affect his real estate, and next in payment of the said charges and all his other debts save as hereafter mentioned and his funeral and testamentary expenses, and all legacies and annuities given by his will or any codicil thereto, and subject thereto that the trustees should invest the cash from time to time in their hands, and for twenty years after his death should accumulate his personal estate, and the rents, dividends, and annual proceeds of his real and personal estate (other than the house and demesne lands of Aughrane), so as to form an accumulating fund.

As to the house and demesne of Aughrane, the testator directed that his trustees should stand possessed thereof to the use of his brother John Lloyd Bagot for his life, with remainder to his eldest son for life, with remainder in tail male. And in default of such

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issue to the use of his brother Bernard William Bagot for life with like remainders, and in default of such issue to the use of his brother Charles Augustus Bagot for life with like remainders; with remainders over, and with the ultimate remainder to the testator's right heirs. The testator empowered his trustees to raise out of the accumulating fund in the first place such sum, not exceeding in the whole £20,000, as they might think fit for the purpose of building, or finishing the building of the mansion-house at Aughrane Castle.

He bequeathed to each of his brothers Bernard William Bagot and Charles Augustus Bagot a legacy of £5000, such legacies to be paid at such time as the trustees deemed they might conveniently be paid out of the accumulating fund, after providing for the buildings and not before, with interest at £5 per cent. from the time of his death, and in case either of his brothers died in his life-time leaving a child or children, such children were to take in equal shares. He bequeathed to his brother John £500, and to his sister Mrs. Meagher, £500, and he also gave to his sister, Mrs. Meagher, for her life, an annuity of £300 a-year, and to his sister Letitia Bagot, for her life, an annuity of £200 a-year, and he directed that such annuities should be paid by half-yearly payments. He directed his trustees to pay £100 a-year to the support of the Protestant Church at Ballygar, and £10 a-year for the Protestant Orphan Society in Galway.

And subject to the aforesaid gifts and after full payment thereof, he directed that his trustees should raise out of the accumulating fund for the child of his wife Alice Emily Bagot, which had been called William, an annual sum of £200 a-year till he attained fourteen years of age, and if he attained fourteen, £300 a-year till he attained twenty-one, and if he attained twenty-one that his trustees should raise out of the accumulating fund, or if the same should be insufficient, out of his estates, interest upon the sum of £10,000, which he charged thereon at £4½ per cent. per annum, and should pay the interest to him till he attained thirty years of age, or if he should attain thirty, or die under that age, but above twenty-one, leaving issue, to pay to him or his issue £10,000 out of the accumulating fund or out of his estates. He declared that his wife should not be entitled to dower or thirds, as he had

provided for her by deed on a separation arranged between them. He then declared that subject as thereinbefore mentioned, the accumulating fund should be accumulated as aforesaid for twenty years from his death, and the trustees should invest any balance of it not required for the purposes before-mentioned in the purchase of freehold lands in Galway or Roscommon, and after the expiration of twenty years the trust for accumulation should cease, so that the income should be payable to the persons and in the manner that the rents of the lands purchased would be if the fund were then already laid out, and the trustees should settle the lands so purchased, and also the real estate thereinbefore devised, of which the rents were to be accumulated, to the same uses and subject to the same powers as were thereinbefore contained with regard to the house and lands of Aughrane.

The testator also left legacies of £500 each to his executors.

By indenture dated the 19th December, 1876, the testator granted an annuity of £1000 a-year to his wife, which by another deed of the same date he charged on his real estates in the counties of Galway and Roscommon.

The testator died on the 23rd May, 1877, leaving his widow and the legatees and devisees named in his will surviving, except Charles Augustus Bagot, who died in his lifetime. John Lloyd Neville Bagot, the testator's brother, had four sons—Thomas Edward Lloyd Neville Bagot, Edward Henry Kirwan Bagot, John Christopher Bagot, and Charles Henry Bagot.

Thomas Edward Lloyd Neville Bagot had a son, Milo Victor Neville Bagot, who was the first tenant in tail of the estates devised, in remainder after the life estates of his father and grandfather.

Bernard William Bagot, the testator's second brother, had no issue male, and Charles Augustus Bagot died in the life-time of the testator, leaving three sons, George H. Bagot, Bernard William Neville Bagot the younger, and William Bagot. Mrs. Bagot entered a *caveat* against the probate of the will which resulted in the Probate suit of *Bagot* v. *Bagot* (1). William Hugh Neville Bagot was made a ward of Court on the 17th December, 1878,

(1) 1 L. R. Ir. 308; 5 L. R. Ir. 72.

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and leave was obtained to attend upon his behalf the hearing of the Probate action. The case was heard on the 25th April, 1878, and twenty-one following days when the jury found that the testator at the time of executing the will was of sound mind, memory, and understanding, except as regarded the paternity of his child, the intervenient, and (by direction of the Judge) that the testator did not know and approve of the contents. A motion for a new trial was refused by the Judge of the Probate Court on the 27th July, 1878. The executors appealed and the Court of Appeal reversed this decision and ordered a new trial by order dated the 5th June, 1879. The trial was directed to be had the following Michaelmas Sittings in the Queen's Bench. On the 30th October, 1879, Mrs. Bagot married R. W. Roberts. A proposal was then made for a compromise of the litigation, which was subsequently carried out by a consent dated the 15th April, 1880, to the following effect:—(1) that the writing dated the 7th day of September, 1876, is the last will and testament of Christopher Neville Bagot duly executed according to the statute; (2) that the defences filed impeaching the validity of the will be withdrawn; (3) that the estates of Christopher Neville Bagot should be charged with the sum of £25,000 for the minor intervenient William Hugh Neville Bagot, and that interest at the rate of £3 per cent. from the date hereof shall be payable on same until the said minor shall attain the age of twenty-one years, and that said sum of £25,000 should not be raised or payable until the said minor shall attain the age of twenty-one years; (4) that if said minor died before attaining the age of twenty-one, the said sum should be paid to his next-of-kin, at the time when he if living would have attained the said age of twenty-one, with interest as aforesaid payable in the meantime; (5) the said sum of £25,000 to be in addition to the sum of £10,000 given to the said minor by the will of C. N. Bagot; (6) that the sum of £8000 should be paid out of the assets by the executors of said will to Mrs. Roberts on an Act of Parliament being obtained giving effect to the terms of this agreement; (7) that the sum of £11,000 should at the same time be paid out of the assets to Mr. H. L. Keily as and for his costs in the suit by the said executors and trustees; (8) that the arrears of the annuity payable to Mrs. Roberts up to the 1st March,

1880, be set off against the costs ordered to be paid by her to the executors by the Court of Appeal; (9) that the sum of £1000 be paid by the executors to Mrs. Roberts on the 1st September then next, as and for the amount due to her for her annuity up to the 1st March, 1881, and the said annuity should be paid to her thenceforward every half year during her lifetime; (10) that Mrs. Roberts and the said R. W. Roberts should in every way possible assist the executors and trustees in obtaining the consent of the Vice-Chancellor and also in obtaining an Act of Parliament to carry out and in every respect give effect to the terms of the consent; (11) that the legitimacy of the child William Hugh Neville Bagot should be admitted by the said parties to this agreement; (12) that the will bearing date the 7th September, 1876, should immediately on the signing of the agreement be admitted to probate in common form, and the executors and trustees should under same proceed to realize the assets of C. N. Bagot and to collect all arrears of rent due on the estates of the said C. N. Bagot; (13) that proceedings should be forthwith taken to obtain the consent of the Vice-Chancellor and also an Act of Parliament enabling the terms of this agreement to be carried out, and on said Act being obtained the said will should be proved in solemn form and established as the last will of C. N. Bagot, deceased; (14) that on this agreement being executed by the above-mentioned parties and their solicitors, the administrator appointed over the personal estate of the said C. N. Bagot and the receiver over his real estate should be respectively discharged, and the executors and trustees should in every respect manage the real and personal estate with full power and authority as the executors and trustees of the admitted will of C. N. Bagot duly proved; (15) that in case the consent of the Vice-Chancellor and the Act of Parliament, necessary to carry out and give effect to this agreement should not be obtained, all parties should be remitted to their rights as then existing, and should be at liberty to proceed as if the agreement had never been entered into.

The £8000 to be paid to Mrs. Roberts by clause 6 was subsequently, by a consent dated the 15th May, 1880, increased to £11,000. By an order in the minor matter, dated the 15th June, 1880, the consents were approved of on behalf of William Hugh

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Neville Bagot; and on the 12th August, 1880, the will was proved in common form.

It was found impossible to carry out this agreement effectively without the sanction of an Act of Parliament, and accordingly a Bill was passed, which was approved of in the minor matter, the Bagot Estate Act, 1881 (xliv. & xlv. Vict. c. iv.), which provided that the executors should prove the will in solemn form; that the real estates should be charged with £25,000 for the minor, which was not to be raised until the 22nd October, 1897, when the minor should attain twenty-one; and if he died before twenty-one the amount should be paid to his next-of-kin, in addition to the £10,000 given him by the will; that £11,000 should be paid to Mrs. Roberts, and £11,000 to H. L. Keily for his costs, by the executors; that the agreements of compromise, dated the 15th April and 15th May, 1880, were confirmed and made binding upon all parties; that the £200 a-year for the maintenance of the minor till he attained fourteen should be paid; that the costs of the minor in carrying out the agreements should be paid; that the forfeiture directed by the will should not take place in case the works directed by the will should not be carried out within five years after the death of C. N. Bagot, and the time for carrying out the works was extended to five years from the passing of the Act; that the amount to be expended on the works should be reduced to £5000; that the building of a tower to the church and additions to the market-house at Ballygar should not be carried out; that the additions to, and improvements in, the house at Aughrane should be limited to £5000; that out of the assets of the testator the costs and expenses of the executors and trustees incurred in preparing and obtaining the Act should be paid, and also their costs incurred in and about the said suit, and the proving of the said will, and the agreements of compromise, including in said costs all costs to be payable by the executors and trustees under the Act, and all costs incurred on behalf of Mr. and Mrs. Roberts in carrying out the compromise; and in case the personal estate of the testator should not be sufficient for payment thereof, then that the deficiency should be paid out of the rents and profits of the testator's real estate, and the executors and trustees were authorized at any time, by mortgage of the fee

of the real estates other than the mansion-house and demesne of Aughrane, to raise and take up at interest such sums of money as should be sufficient for discharging the deficiency, and the trustees were authorized, with the approval of John Lloyd Neville Bagot, to pay to Messrs. Fry & Son such sum of money as they might agree to accept in full discharge of all costs, as solicitors for Bernard William Bagot and Joseph Arthur Holmes, as executors and trustees, up to the 15th April, 1880; that until the expiration of twenty years, to be computed from the death of the testator, the trustees, or the survivor of them, and the trustees for the time being of the will, should have full power and authority to manage the lands other than the house and demesne of Aughrane.

The Act contained a saving clause, which preserved to the Queen, all persons and bodies politic and corporate whatsoever, and to their respective heirs, successors, executors, and administrators (other than the persons who by the Act were expressly excepted out of this general saving), all estates, rights, titles, interests, claims, and demands whatsoever, both at law and in equity, and which they respectively then had, or would have had, if the Act were not passed. It also contained a clause stating that certain persons were bound by the Act, amongst whom Mrs. Meagher was not included.

The testator's personal estate amounted to about £60,000, and the real estate was worth about £6000 per annum. The personal estate was stated to have been all exhausted in law costs, expenses, and duties. The £11,000 provided for Mrs. Roberts, and the £11,000 for Mr. Keily, had both been paid.

A petition for sale of the real estate was presented to the Land Judge, on which conditional and absolute orders for sale were made. On the 10th July, 1899, an order was made appointing a receiver, and it became necessary to fix the priorities in which he should apply the rents and profits. By order, dated the 30th March, 1900, Ross, J., directed that the receiver should pay the interest on the incumbrances in the following order:—(1) The annuity of £1000 to Mrs. Bagot, secured by the indenture of the 19th December, 1876; (2) a sum of £6600, secured by mortgage, dated the 1st July, 1882, from Bernard William Bagot and Joseph Arthur Holmes to William Bredin; this £6600 was

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raised to pay costs under the Bagot Estate Act; (3) a sum of £6000, secured by mortgage, dated 1st July, 1882, from Bernard W. Bagot and J. A. Holmes to W. E. Holmes; this was also a mortgage for costs; (4) annuity of £200 to Mrs. Meagher; (5) annuity of £100 to Church Representative Body; (6) annuity of £10 to Protestant Orphan Society, Galway; (7) charge of £25,000, created under Bagot Estate Act, 1881, in favour of William Hugh Neville Bagot; (8), (9), (10), were the legacies of £5000, £5000, and £10,000, bequeathed to B. W. Bagot, C. N. Bagot, and W. H. Neville Bagot, respectively, by the will of the testator.

March 30.

The judgment delivered by Ross, J., was as follows:—

The questions I have now to decide arise on the settlement of an order fixing priorities.

The late Christopher Neville Bagot of Aughrane Castle, Galway, made a will on the 7th September, 1876. He died on the 23rd May, 1877, leaving him surviving Alice Emily Bagot, his widow, and William Hugh Neville Bagot, his son. The widow took nothing under the will, and the son, whose legitimacy the testator did not recognise, only took a legacy of £10,000. Then followed the celebrated Probate suit of *Bagot* v. *Bagot* (1). After a protracted trial the jury arrived at certain conclusions in respect of some of the issues submitted to them, but were unable to agree as to others. Thereupon, by direction of the learned Judge, the jury found a verdict condemning the will. An application for a new trial was made by the executors and trustees, who were the defendants in the suit, to the same learned Judge. The Court refused the motion, and from this order the executors appealed. An order was made in June, 1879, by Her Majesty's Court of Appeal, reversing the order appealed from, setting aside the verdict and directing a new trial. The trial was postponed several times, and, finally, on the 15th April, 1880, a compromise was effected, and the terms of it put into writing. A further consent was signed by the parties

(1) 1 L. R. Ir. 308; 5 L. R. Ir. 72.

on the 15th May, 1880. The effect of the compromise was to set up the will upon certain terms. The Vice-Chancellor, in whose Court the case of William Hugh Neville Bagot, a minor, was pending, approved of and adopted the consents. A private Act of Parliament was, however, necessary in order to carry the terms into effect. Accordingly, the Bagot Estate Act was passed in the year 1881.

The personalty appears to have been swallowed up in the great costs of the legal proceedings. The rents of the testator's considerable estates in Galway have been cut down by the action of the Land Acts. An absolute order has in this Court been made for sale; a receiver has been appointed. As the rents are manifestly insufficient to meet the interest on the charges, it becomes my duty to ascertain the priorities, to decide on what portions of the estate certain incumbrances are charged, and whether certain of them are charged on the lands at all. These are questions of construction of the testator's will, the agreement or consent of 15th April, 1880, and the Bagot Estate Act.

The priority of a yearly rentcharge of £1000 payable to the widow who is now Mrs. Wynne Roberts—created by a deed of 1876—is undisputed.

Then, we have a number of mortgagees and sub-mortgagees, claiming on foot of mortgages executed under the powers in the Bagot Estate Act, for the purpose of raising money to pay the costs of the executors in the will suit.

Next come the annuitants, who contend that they are not bound by the Act at all.

Fourthly, we have a sum of £25,000 for William Hugh Neville Bagot. This is the money agreed to be paid to the minor in order to buy off the opposition of his mother.

Then we have two sums of £5000 payable to the testator's brother Bernard William Bagot and the children of Charles Augustus Bagot under the terms of his will. And, lastly, we have the sum of £10,000 bequeathed by the testator's will to William Hugh Neville Bagot.

Much has been plausibly said for the first four classes. The will, it is said, could never have been proved if the costs had not been incurred. But the annuitants, not bound by the Act,

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contend that the will is set up, and that nothing can come out of the assets to their hurt that is not directed by the will. For William Hugh Neville Bagot it is contended that his £25,000 is purchase-money for the right to prove the will.

I shall take first the case of the costs. All parties have agreed that the will of the testator should be set up. We must first find if the will deals with the matter; next, we must consider, if so, whether there is anything in the consents or Act of Parliament to prevent the testator's intention from being carried into effect.

The testator directs that the rents, interest, dividends, and annual proceeds of his real and personal estate (other than Aughrane), and the proceeds of such chattels as should be sold pursuant to his will, should first be applied in payment of interest as the same should become due upon any charges that might affect his real estate at the time of his death, and next in payment of the said charges and his debts (save as thereinafter mentioned), and his funeral and testamentary expenses, and all legacies and annuities given by his will.

I am of opinion that these words have the effect of throwing all the charges on the *corpus* of both real and personal estate. I shall afterwards give my reasons when I come to deal with the priority of the annuities.

Do the words testamentary expenses include these executors' and trustees' costs incurred in the probate suit? In the absence of authority the matter would appear to be quite plain. They are costs incurred in establishing the testament. Until the probate there is in a sense no testament. It was the duty of the executors to establish the will, and to prevent the testator's wishes, as therein expressed, from being completely frustrated. I cannot imagine anything that could more perfectly come under the head of testamentary expenses. It is contended that, unless the executors are declared entitled to their costs, these costs are not testamentary expenses. I see no ground for this contention. It may apply to the costs of parties, other than executors, whose costs in probate suits have, when awarded to them by the Court, been treated as testamentary expenses. I do not at all lay down that every kind of expense in which executors may indulge in probate proceedings are necessarily testamentary expenses.

Counsel for William Hugh Neville Bagot have contended that, from the reports of the new trial motions, there was misconduct on the part of the executors disentitling them to costs. Counsel for the parties unbound by the Act in no way supported this view. Such a contention cannot be put forward by a person bound by the Act, because under section 15 the executors' costs and expenses incurred in and about the said suit and the proving of the said will are to be paid out of the testator's assets. The executors' costs are not mentioned in either of the consents of 15th April, 1880, and 15th May, 1880. It was not necessary that they should, because they were authorised to go into actual possession of the testator's assets. By the first consent the costs of the other parties were intended to be paid on the Act being obtained. By the second consent the sum payable to Mrs. Bagot was raised raised from £8000 to £11,000, and was to be paid to her out of the first moneys that should come to the executors' hands. It is important to observe that in section 15 all the costs are bulked, and the trustees are authorised to mortgage the real estate (other than Aughrane) to supply the deficiency that might be caused by the failure of the testator's personal estate to satisfy all the costs. It is hard to imagine that there could have been any intention of postponing payment of the executors' costs, though all the others were to be paid as soon as possible. Everything in the Act seems to be consistent with what I have already stated is, in my opinion, the effect of the will.

The next question is whether Mrs. Meagher, who has a life annuity of £200, the Church Representative Body and the Galway Protestant Orphan Society are bound by the Act. It is contended that they are bound, because the executors represent all the legatees; and the executors are themselves bound. This would be, in my opinion, a misconstruction of the 17th and 18th sections of the Act. All estates, rights, titles, claims and demands, are preserved to the Crown, and to all persons and bodies politic and corporate (other than the persons who by the Act are expressly excepted out of the general saving) which they would have if the Act were not passed. In section 18, the persons, and their heirs, executors, administrators or assigns, are specified, and it is declared that only these so specified are to be bound. The annuitants are therefore unbound, but this does not give them priority over the costs.

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The costs are, as I have stated, testamentary expenses, given by the will itself. Apart from the will these annuitants take nothing; the costs of establishing the instrument under which they take must clearly come before them.

The next contention is, that neither these annuities nor the testamentary expenses are charged on the *corpus*, but only on the accumulating fund, which has disappeared. It is contended that when the testator wishes a legacy to be charged on the *corpus* of his property he does so by express words, as in the case of the legacy of £10,000 to William Hugh Neville Bagot. The testator directs that the rents, interests, dividends, and other annual proceeds of his real and personal estate, except Aughrane, and the proceeds of such chattels as may be sold pursuant to his will shall be applied as follows:—

1st, in paying the interest on the charges on his real estates, and 2nd, in paying the said charges, his debts, his funeral and testamentary expenses, and all legacies and annuities, and subject thereto the trustees are to accumulate for twenty years from his death. A gift of income is sometimes a gift of capital; it is sometimes a gift of income alone; all depends on the context. We find that his debts and existing charges on the real estate, to satisfy which the *corpus* could be sold so far as necessary, are bulked with the annuities, legacies, and testamentary expenses. Further, the accumulation which is to take place "subject thereto" is only to last for twenty years after the testator's death. But one of the annuities, namely the £200 per annum, is given for the life of Mrs. Meagher. This seems a sufficient indication that the testator intended the testamentary expenses and annuities to be charged on the *corpus*, and not on income alone.

We have now to consider the priority of the £25,000 for William Hugh Neville Bagot. It has been contended with great force by his counsel that the will would never have been allowed to be proved but for the payment of this sum, and that therefore it should be in priority to the costs and annuities created by the will. We must remember that we are dealing with the case of a compromise of an action, the end of which was a matter of great uncertainty. If it had gone on the will might have been proved in its entirety with costs against Mrs. Bagot, or it might have

been broken, with costs against the executors. The question is therefore one of the construction of the Act of Parliament, and the consents by which the action was compromised. I have already given my reasons for holding that the mortgages for raising money for costs take priority over the annuities. If I am right in holding that the annuitants are unbound by the Act, it seems to me clear that they take priority over the £25,000. William Hugh Neville Bagot is bound by the Act, which sets up the will. It is under the Act that this charge is created. But the annuitants are independent of the Act, and are entitled to prevent assets available for the satisfaction of their annuities from being applied pursuant to the terms of the Act.

As regards the legacy of £5000 to Bernard William Bagot and a like amount to Charles Augustus Bagot, the former is bound by the Act; and the children of the latter are also bound, their father having predeceased the testator. They are clearly in equal priority, and rank next to the £25,000.

As regards the legacy of £10,000 to William Hugh Neville Bagot, it has been vigorously contended on one side that the £25,000 is to come down to the level of the £10,000; and by counsel on the other side that the £10,000 is to go up to the level of the £25,000. Both these contentions are founded on the words "in addition to" which occur in paragraph 5 of the Act. Cases have been relied on in which a legacy given by a will has been increased by a codicil, and the gift in the codicil has been held to have the same priority as the gift in the will. These cases seem to me to have no application. The words "in addition to" are inserted for the purpose of preventing the trustees from contending that the £25,000 is all that William Hugh Neville Bagot is to get. It was intended that his rights under the will should not be affected by his receiving the £25,000 under the Act. I am therefore of opinion that the £25,000 is before the two legacies of £5000, and that the £10,000, in accordance with the terms of the will, comes after them.

The only question that remains to be disposed of is, whether the £25,000 is charged only on the testator's real estates other than Aughrane, or whether it is charged on all the testator's real estates, including Aughrane. No doubt if, after the specific devise

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of Aughrane, the £25,000 was charged by will on all his estates, the lands specifically devised would escape contribution, for this reason that, when a testator makes a specific devise, as soon as the will comes into operation it must be presumed that he intends to separate this property from the rest. It must be presumed that the specifically devised property passes in its integrity and without derogation : *Conron* v. *Conron* (1). That however, is not this case. The charge of £25,000 is not created by the will at all. It is the creation of the compromise, and the Act of Parliament. The agreement of compromise is a contract for value. There seems to me to be no room for doubt. The compromise provides that all the estates of the testator shall be charged. Again the Act purports to deal with the entire estates. Section 3 enacts that the said real estates shall be charged with the sum of £25,000 ; that means that as soon as the Act comes into force, the charge takes effect upon all the lands. The Schedule attached to the notice of motion seems to me to carry into effect what I have decided, and I accordingly direct the receiver to pay in accordance with the Schedule.

W. C. S.

May 11, 12, 14, 15, 16. June 20.

W. H. Neville Bagot appealed (2).

W. M. Jellett, Q.C., and *Gerald FitzGibbon*, for the appellant :—

We are entitled to priority over the mortgages for the costs. By the compromise the minor gave up his right of contesting the will in consideration of a charge of £25,000 on the estate, and that must be paramount to any claim under the will. It was a ransom given by the executors and trustees to enable them to prove the will, and before any personal estate could be dealt with, and it was charged on the real estate : *Wood* v. *Medley* (3).

The costs of the executors and trustees have not been provided for, and do not affect the lands ; the compromise said nothing about the costs. The Probate Court has no jurisdiction to charge

(1) 7 H. L. Cas. 168.

(2) In the Court of Appeal before Palles, C.B., and FitzGibbon and Holmes, L.JJ.

(3) 1 Hag. 645, 656.

the costs on real estate: *Newton* v. *Newton* (1); *Young* v. *Dendy* (2); *Charter* v. *Charter* (3). These costs do not come under the term "testamentary and executors' expenses": *Goodwin* v. *Prince* (4). The confirmation by Parliament of the compromise relates back to the date of the compromise, and charges the estates with £25,000 for the appellant, as of the 15th April, 1880. The costs were not charged by the compromise, and take priority only as of the date of the passing of the Act. The Bagot Estate Act was obtained by the executors, and must be construed strictly against those who obtained it: Maxwell on Statutes, 363, 383; Hardcastle on Statutes, p. 519.

(2.) We say that the appellant's charge takes priority over the charges which are only on the accumulated fund. The period of twenty years has elapsed, and the accumulating fund is not there. In such a case a charge on the rents and profits is not a charge on the *corpus* of the estate: *Foster* v. *Smith* (5); *Baker* v. *Baker* (6); *West's Estate* (7); *Re Green* (8). The legacies and annuities are only on the accumulated fund, and not on the estate itself. The intention of the testator, plainly expressed in the will, was that during the twenty years annuities and interest and principal of charges, other than the £10,000, should be paid out of rents and profits; and that the only charge upon the fee should be the £10,000. Therefore, the only existing charges after the expiration of the period of accumulation are Mrs. Roberts' annuity, the appellant's £25,000, the costs mortgages, and the appellant's £10,000, in the order named.

(3.) The next question is, who are bound in this case? We submit that all the legatees are bound, not so much by the Act as by the compromise: *Duffy* v. *Brady* (9); *Wood* v. *Medley* (10). If an executor obtain probate by a compromise, that binds the legatees to this extent, that any legatee, who objects, must set aside the compromise. It is inequitable that a legatee should claim the benefit of a compromise by which opposition to a

(1) 13 Ir. Ch. Rep. 245.
(2) L. R. 1 P. & D. 344.
(3) 3 Ch. D. 218.
(4) [1898] 2 Ch. 225.
(5) 1 Phil. 629.
(6) 6 H. L. Cas. 616.
(7) [1898] 1 I. R. 75, 88.
(8) 40 Ch. D. 610.
(9) Milw. 582.
(10) 1 Hag. 656.

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doubtful will was withdrawn while repudiating payment of the price of withdrawal. Mrs. Meagher, who was actively engaged in the action of *Bagot* v. *Bagot* (1), and was charged with undue influence, and the costs mortgagees, who claim through the executors, and the legatees of £5000, are estopped by the compromise from claiming priority to the £25,000.

(4.) We submit that the £10,000 is charged on the house and demesne of Aughrane. The charge is to be paid "out of my said estates." In every other place in the will in which the expression "my said estates" occurs, it *must* include Aughrane, and the same force should be given to it in this, the only doubtful, passage. On all other occasions the testator, when he wished to exclude Aughrane, did so in express terms.

T. Pakenham Law, Q.C., Ronan, Q.C., and *J. Leech*, for C. White, the petitioner :—

The will gives the testamentary expenses as the first trust. Testamentary expenses include the costs of the executors in proving the will and doing all necessary acts to distribute the assets. The first duty of the executors was to obtain probate. Executors' expenses include all costs incident to the proper performance of the duty of executor : *Sharp* v. *Lush* (2). A direction in a will to pay testamentary expenses and debts includes the costs of an administration suit : *Harloe* v. *Harloe* (3) ; *Re Mayhew* (4) ; *Kelly* v. *Kelly* (5) . In *Brown* v. *Burdett* (6), where testamentary expenses were charged on real estate, and probate of the will was opposed, but the opposition was withdrawn upon the terms that the costs of the opponents should be paid out of the estate, in accordance with the practice of the Probate Court, such costs were held to be testamentary expenses, and payable out of the real estate. Section 15 of the Bagot Estate Act provided that the costs and expenses of the trustees and executors incurred in the suit, in proving the will, and in obtaining the Act, should be paid. The Act and the will should be read together, and the Act ought to be regarded as a decree reforming some of the provisions

(1) 1 L. R. Ir. 308 ; 5 L. R. Ir. 72.
(2) 10 Ch. D. 468.
(3) L. R. 20 Eq. 471.
(4) 5 Ch. D. 596.
(5) 21 L. R. Ir. 243.
(6) 31 W. R. 854

of the will, and the executors and trustees had the duty imposed on them of carrying out the trusts created by the combined operation of both instruments. The Act should be read into the will like an instrument exercising a power: *Stackhouse* v. *Barnston* (1); *Simpson* v. *O'Sullivan* (2); *Creagh's Estate* (3). The Act gives power to mortgage the fee for the costs, and these mortgages take priority over all the estates devised. If the £25,000 has priority, the power to mortgage the fee cannot be carried out in its entirety.

The legacies are not charged on the specifically devised estates: *Conron* v. *Conron* (4). The persons not bound by the Act should be placed upon the schedule above those who are.

Conner, *Q.C.*, and *D. G. Chaytor*, for Mrs. Meagher, Bernard William Bagot, and Charles Augustus Bagot:—

We are entitled to be placed on the schedule next after Mrs. Roberts' annuity of £1000 a-year. Mrs. Meagher is not bound by the Act of Parliament, as she is not mentioned in sect. 8. Every one interested in the will was bound except the annuitants and small legatees. If a will is proved after an expensive suit upon an agreement that the executor should have his costs out of the assets, then the legatees who claim only under the will would be bound by it: *M'Feely* v. *Boyle* (5). An executor has no right to compromise upon terms: *Ormsby* v. *Good* (6). An executor has the duty placed on him of proving his will; a legatee can do nothing; he cannot move to set aside probate of a will granted in common form. The Act had no further effect than the compromise; it enabled the real estate to be charged with £25,000.

The legacies in this case are charged on the lands; the words of the will are, "subject thereto," and that has the effect of charging them: *Dowling* v. *Hudson* (7); *Bell* v. *Bell* (8); *Moore's Estate* (9); *Jones* v. *Williams* (10). The legacies of £5000 are to be

(1) 10 Ves. 453.
(2) 7 Cl. & Fin. 550.
(3) 25 L. R. Ir. 128, 139.
(4) 7 H. L. Cas. 168.
(5) 17 L. R. Ir. 653.
(6) [1895] 1 I. R. 103.
(7) 17 Beav. 248.
(8) I. R. 6 Eq. 239.
(9) 19 L. R. Ir. 365.
(10) 1 Coll. 156.

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paid first out of the particular fund; but if they are not so paid, then they are to come out of the estate: *Hodges* v. *Grant* (1). The £10,000 for William Hugh Neville Bagot must be postponed to all the first given legacies; there is no indication that the £25,000 was to be the first charge.

F. Fleming, Q.C., and *Poole*, for the owner, Milo Hugh Neville Bagot:—

The £10,000 is not charged on Aughrane. A general charge does not affect specifically devised lands: *Conron* v. *Conron* (2); *Bank of Ireland* v. *M'Carthy* (3). Under the will the trustees took no estate in Aughrane. The words "said estates" in the will only refer to the estates chargeable with the £10,000, and not to Aughrane, and the term of twenty years applied only to the accumulation of rents and profits of the estate other than Aughrane.

Garrett Walker appeared for the Representative Church Body.

W. F. Kenny, for the Protestant Orphan Society.

June 20.

The Lord Chief Baron:—

This is an appeal from an order of Mr. Justice Ross, fixing the priorities of certain incumbrances. The lands have not been sold, nor has the schedule of incumbrances been ruled; but a receiver has been appointed, and the object of settling the priorities is to ascertain those to the discharge of which, or the interest on which, the receiver should be directed to apply the rents received by him.

It is agreed by all that the sum likely to be realised by the sale of the lands will be wholly inadequate to pay all the charges. For this reason, we think that it is not convenient to consider the priority, *inter se*, of some of the puisne incumbrances which may never be reached by the purchase-money, as a decision in reference to them at the present stage might possibly involve expensive proceedings in reference to questions which may in

(1) L. R. 4 Eq. 140. (2) 7 H. L. Cas. 168. (3) [1898] A. C. 181.

event prove to be immaterial. This course is the more advisable, as there is no evidence before us as to the amount, or application, of the personalty or of the rents of the real estate received by the trustees and executors during the term of twenty years from the testator's death, which constitutes the primary fund for payment of the puisne incumbrances in question.

There are, however, two matters which must be now decided. First, the priority, *inter se*, upon the estates, other than the Aughrane demesne, of, upon the one hand, the sum of £25,000 which, by the private Act of Parliament, was charged upon all the testator's estate in favour of his son William Hugh Neville Bagot; and of, upon the other hand, the mortgages granted under the same Act to secure the money raised to pay the balance of the costs of the executors and trustees of the litigation and of the Act of Parliament. Secondly, the priorities of the two last-mentioned charges, viz. the £25,000, and the mortgages, as between them and the annuity of £200 a-year bequeathed to Mrs. Catherine Meagher, and two other small annuities bequeathed by Mr. Bagot's will.

The right of Mr. William Hugh Neville Bagot to the £25,000 arises under sections 3 and 7 of the Act. Section 3 enacts that "The said real estate of the said Christopher Neville Bagot shall be charged with the sum of £25,000 for the benefit of the said minor, William Hugh Neville Bagot, with interest at the rate of £3 per cent. per annum on the said sum of £25,000 to be computed from the 15th day of April, 1880." Section 7 confirms and makes binding on all the parties interested certain agreements of compromise (to which I shall afterwards refer) "so far as the same are not inconsistent with the provisions of this Act." I shall hereafter refer to these words, "so far as the same are not inconsistent with the provisions of this Act," which qualify the confirmation by the act of the compromise agreements; but before doing so it is necessary to state shortly the agreements thus referred to.

The first of these agreements bears date the 15th April, 1880. It is made between Mrs. Alice Emily Roberts, the widow of the testator and mother of Mr. William Hugh Neville Bagot, Mr. Reginald Wynne Roberts, her husband; Mr. Bernard William Bagot, and Mr. Joseph Arthur Holmes, the trustees and executors,

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and certain parties who, had the will been valid, would have had certain estates in the testator's realty under his will. It provides, *inter alia*—1, that the writing of the 7th September, 1876, is the last will of the deceased, duly executed according to the statute; 2, that the estate of the said Christopher Neville Bagot shall be charged with the sum of £25,000 for the minor intervenient, the present Mr. William Hugh Neville Bagot, with certain interest to which I shall hereafter refer; 6, that £8000 shall be paid out of the assets by the executors of the will to Mrs. Alice Emily Roberts, on an Act of Parliament being obtained giving effect to the terms of the agreement; 7, that £11,000 shall be at the same time paid by the executors and trustees, to Mr. Henry L. Keily as and for costs in the suit; 13, that proceedings shall be forthwith taken to obtain the consent of the Vice-Chancellor (the Judge to whose chambers the matter of William H. N. Bagot, a minor, was attached), and also an Act of Parliament enabling the terms of the agreement to be carried out; and *on* the Act being obtained that the will should be proved in solemn form and established as the last will of Christopher Neville Bagot, deceased.

The second compromise agreement is not material. It bears date the 15th May, 1880; but it does no more than increase to £11,000 the £8000 which by the 6th clause of the first agreement was provided to be paid to Mrs. Roberts. For all substantial purposes, this second agreement may be left out of consideration; so that the case is to be determined as if the terms of the compromise were contained in the document of the 15th April, 1880.

Two things are to be observed in reference to this document. The first is, that it does not contain any reference to the costs of the executors and trustees. Had all the parties to the compromise been *sui juris*, and competent by their acts to bind the fee-simple of the estates of the testator, so that it would have been unnecessary to have obtained an Act of Parliament, that agreement would, in my opinion, have precluded the executors and trustees from setting up, against the claim of Mr. William Hugh Neville Bagot, to the £25,000, any charge for their own benefit whether upon foot of the costs in question, or for money borrowed to pay them, or otherwise.

The second observation upon the agreement is in reference to the sums agreed to be paid to Mrs. Roberts and to Mr. Keily.

The sum agreed to be paid to Mrs. Roberts must be taken to represent the estimated value of her chance of that to which she would have been entitled in the case of the impeached will being invalid. It does not appear to what she would have been entitled in that event, and whether her title thereto would have been under an intestacy or under a prior will. There does not appear upon the documents, or at all, any suggestion of such a prior will, nor does there appear to be any reason why the sum provided for her should rank as a charge upon the estates in priority to the provision for the heir-at-law, William Hugh Neville Bagot, a provision which must be taken to represent the value of his chance of succeeding, either through an intestacy, to the real estate and two-thirds of the personalty, or, through some other will, to some property willed to him. Yet the £11,000 is to be paid to Mrs. Roberts *on* an Act of Parliement being obtained "giving effect to the terms of the agreement"; and the costs of her solicitor, Mr. Keily, are to be paid "at the same time." It is true that it is provided that the principal of the £25,000 is not to be raised until William Hugh Neville Bagot shall have attained, or had he lived would have attained, the age of twenty-one; but the scope of the will and of the agreement satisfies me that this postponement was merely for the convenience of the estate, and that it was not intended in anywise to affect the priority of the charges for the sums to be paid to himself and his mother.

A consideration of the nature of the agreement leads to the same result. The executors and trustees claimed through the will. If they sustained that claim they would have taken the entire estates, real and personal, upon the trusts of the will. On the other hand, if they failed, not only would there have been no trust estate, but they would have been neither executors nor trustees; and they would have been liable to all the costs incurred by them in attempting to prove the will. The case, therefore, is not one between rival *cestui que trusts*, claiming under an instrument the trustees whereof would be entitled, however the matter in controversy might be solved. Whatever represented the value of the chance of breaking the will should necessarily have the

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same character as that to which the wife and son would have been entitled in case the will were condemned; that is, it would still have been assets of the deceased, but not assets to which the trustees and executors would have been entitled.

My view of the agreement is that, *quoad* the stipulated portion of the testator's property, viz. the £25,000 and the £11,000, the testator was to be deemed to have died intestate, and that that property should be dealt with as if it had not passed by the will; that it should go (not, indeed, directly according to the mode in which it would have devolved upon an intestacy, because the entire of the £25,000, which included the sum which represented the chance of the heir's accession to the real estate was provided to go as personalty, but) in a modified manner, approved of by Parliament and by the Vice-Chancellor as being for the benefit of the minor; and this modified form had, as its basis, that as to this portion there was an intestacy. Had it not been for the clauses of the agreement, which admit the validity of the will, and provide for its proof in solemn form on the Act of Parliament being obtained, this would have been incontrovertible. But these clauses cannot be taken *per se*. The admission of the validity of the will was made *sub modo* only. It was to take effect only on the passing of the Act, "enabling the terms of this agreement to be carried out." The document purporting to be the will was to be deemed the will, but only in consideration of a certain price. How, then, can this admission be taken as absolute, in determining what is this price, or the mode in which it is to be paid? Further, this admission of the validity of the will is a matter, not of substance, but of form. Whilst probate can be granted of a will, omitting a particular bequest which has been condemned on grounds which do not affect the other dispositions, it would be unheard-of to ask the Judge of the Probate Division to decree probate of a will purporting to dispose of all the property of a testator, with a provision in that probate that from its operation should be excepted a portion of the testator's property not the subject-matter of a particular clause in the will, and that that excepted portion should be administered as if he had died intestate. It follows that, in cases of compromise of this nature, it is essential that, if the will is to

have any effect as a will, there should be probate of it as such. I therefore do not attribute any importance, upon the question of priority, to the so-called admission of the validity of the will.

If this case were to be determined merely upon the terms of the agreement, and irrespectively of the Act, I should be of opinion that the £25,000 should have priority over the costs, and over the money borrowed for their payment.

The Act, however, cannot be left out of consideration; and, accordingly, I proceed to consider it.

The section which confirms the compromise is in these words:—"(7) The said hereinbefore recited agreements of compromise, dated respectively the 15th day of August, 1880, and the 15th day of May, 1880, *so far as the same are not inconsistent with the provisions of this Act*, are by this Act confirmed and made binding on all parties interested, and full effect shall be given thereto, notwithstanding that parts of the said agreements are not specifically enacted in this Act." Were it not for the words "so far as the same are not inconsistent with the provisions of this Act," the question on the Act of Parliament would be identical with that upon the agreement, which I have already considered; and thus the only inquiry is the meaning of those words.

The difficulty, if any, that there may be upon this part of the case arises from the Act having two objects: first, to give a certain effect to the compromise—what that effect is will afterwards appear—and, secondly, to make certain modifications in the trusts of the will. These modifications were not the subject of the agreement for compromise. The recital of these two different objects will be found on page 24 of the Act. The recital of the first object is that "it would be for the benefit of all parties interested in or claiming to be interested in the subject-matter of the hereinbefore recited agreements of compromise of the 15th day of April, 1880, and the 15th day of May, 1880, including the said minors, William Hugh Neville Bagot and Milo Victor Neville Bagot, that such effect as is by this Act given to the said respective agreements of compromise should be given thereto." The recitals in relation to the second object commence with statements that during the litigation large arrears of rent had accrued due, and were irrecoverable;

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that by reason of the costs of the litigation and the terms of the compromise the annual income available for the creation of the accumulating fund would be much less than the testator intended, and that it was, therefore, expedient that £5000 only, instead of £20,000, should be raised out of that fund for building; there are then recitals that it was expedient that the time limited by the will for the completion of the works thereby directed should not be the limit of time within which the works authorised by the Act in their stead should be completed; that it was expedient that the non-completion of the works, directed by the will, within the time thereby limited, should not work a forfeiture; that it was expedient that during the residue of the term of twenty years the trustees should have certain powers of managing the estates; and then, for the first time, appears the recital: "whereas it is also expedient that provision should be made for the payment of the costs and expenses incurred by the trustees." In reference to this latter recital, it is right to observe that it does not state that the provision for the payment of the costs and expenses was matter of agreement with Mr. and Mrs. Roberts, or with those who represented the minor, nor that that intended provision rendered necessary any modification of the compromise agreement, nor that there was any intention that that agreement should be altered in that respect.

The enacting portions of the Act can be divided into two classes. Sections 2 to 9 inclusive are in relation to the compromise; sections 10 to 14, and section 16, give effect to such modifications of the trusts as were not the subject of the agreement; and in section 17 is the provision for the payment of the costs of the trustees, which is now relied on as giving the mortgages, for the sums borrowed to pay the same, priority over William Hugh Neville Bagot's £25,000.

I think it material to ascertain, in the first place, whether, in the portion of the Act dealing with the compromise, viz. sections 2 to 9, there is anything which can account for the introduction into section 7 of the words, "so far as the same are not inconsistent with the provisions of this Act." I find at least three provisions that are technically of that character. Whilst the 3rd clause of the agreement of the 15th April, 1880, provides that

interest at the rate of 3 per cent. shall be payable on the £25,000, until the minor shall attain the age of twenty-one, it does not state the days upon which such interest shall be payable. Section 3 of the Act supplies this omission, and is technically inconsistent with the agreement, so far as it directs that the payments shall be made, half-yearly, on the 22nd October and the 22nd April in each year. In the same way, the 4th clause of the agreement does not state the gale days for payment of interest, in case the minor should die before attaining twenty-one. This want is supplied by section 4 of the Act; and in this respect, too, is there a technical inconsistency between the Act and the agreement. Even more important is section 8 of the Act. The 5th clause of the agreement provides that the £25,000 is to be in addition to the sum of £10,000 given to the minor by the will. The will directs his trustees to raise for the child, William H. N. Bagot, out of the accumulating fund, such annual sum as to them shall seem fit, *not exceeding* £200, for his maintenance, clothing, and education in each year, until such child shall attain fourteen years of age. Section 8 of the Act varies this trust; and in this respect varies the compromise agreement. "The annual sum to be raised for the maintenance, clothing, and education of the said minor, William Hugh Neville Bagot, until he shall attain the age of fourteen, shall be the sum of £200." That is, the discretion of the trustees to raise an annual sum less than £200 is extinguished. This is a substantial inconsistency between the Act and the agreement.

In my opinion, these three inconsistencies between the agreement and the Act are sufficient to account for the words in section 7, "so far as the same are not inconsistent with the provisions of this Act." Indeed, that section would not have been accurate, had it not contained words to this effect; and in my opinion the effect of that section was to confirm the agreement, subject only to those three alterations. While section 15 no doubt authorises the executors and trustees to raise money by mortgage for payment of any deficiency of their costs which their other available funds would be inadequate to meet, I am unable to read it as a clause modifying, or inconsistent with, the compromise agreement, or authorising the trustees and executors to raise those

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sums by a charge prior to that for the £25,000. To hold that those mortgages could take that priority would be to construe the Act as a legislative sanction to the trustees derogating from their own agreement, to the prejudice of a minor, and to do so upon the construction of an Act in which there is no recital of any such intention, and the main object of which was to confirm the agreement. Full effect can be given to section 15, and to the recitals *in pari materiâ* with it, by holding that this section bound the estates, rights, and interests under the will, which were not saved by sect. 17, but that it did not affect the charge for the £25,000, which was taken, not under the will, but against it.

The remaining question is whether the £200 a-year bequeathed to Mrs. Meagher, and the arrears of the two other smaller annuities bequeathed by the will (all of which I think it reasonably clear are charged on the fee of the estates), take priority of the £25,000, and the mortgages for the costs.

Now, the claim to the £25,000 arises solely under the Act of Parliament. Were there no such Act it could not be contended that William Hugh Neville Bagot had any claim whatsoever upon the estate. But the 17th section of the Act saves to all persons, "other than the persons who by this Act are expressly excepted out of this general saving, all estates, rights, titles, interests, claims, and demands, whatsoever, both at law and in equity, which they respectively now have, or would have if this Act were not passed." The persons expressly excepted out of this general saving are those named in section 18. This section does not name Mrs. Meagher, or the persons entitled to the other annuities; and the section itself says that the persons so named are "the only persons bound by this Act." I am, therefore, of opinion that, so far as the annuities in question are concerned, the Act of Parliament must be left out of consideration, and consequently that the annuities are prior to the £25,000.

In my opinion, reasoning nearly identical applies to the costs mortgages. It is possible that, had the suit proceeded, and had the executors and trustees succeeded in it, they might have obtained a decree which would have entitled them to some of those costs in priority to the claims of these annuitants. It is also possible that they might have been deprived by the decree of the right to charge

some of those costs upon the assets, and that they might have been ordered to pay some costs to the opposite party. But the case did not proceed to a final hearing. The title of the executors and trustees to their costs is not under any decree declaring them testamentary expenses, but is under the Act of Parliament, and under that alone. Their claim to them under the Act is answered by the saving of the rights of the annuitants from the operation of the Act to which I have already referred.

The remaining questions relate to the two legacies of £5000 each, and the legacy of £10,000. Now, undoubtedly the primary fund for the payment of these three sums is the personalty, and the rents and profits, for the term of twenty years, of the lands other than Aughrane demesne; and therefore it is impossible that the receiver can be permitted to pay anything upon any of these charges, until it has been ascertained whether there is a deficiency of that primary fund, *i.e.* until the accounts of this personalty, and of the rents and profits, have been submitted, and either taken or agreed to. It would therefore be not only useless to decide at present any of the questions argued in relation thereto, but none of them are ripe for decision. As to these, this appeal must stand over until the final schedule of incumbrances has been ruled, and the accounts have been either taken or agreed to.

As to the costs, the appellants must have their costs below and here, with the £25,000. Mrs. Meagher will have her costs with her demand. The mortgagees will have one set of costs with their demand; and all other parties will abide their own costs.

FITZ GIBBON, L. J.:—

Concurring, as I do, with the Lord Chief Baron, I shall give my reasons in general terms:—

The Bagot Estates Act operates upon the rights of all the parties who are bound by it, as a statutory contract. As an Act of Parliament its effect is absolute; but, both as a contract and as a statute, it operates according to its terms; it must be construed like any other document, and its effect must be ascertained from its language. The leading parties to the Act were, on the one hand, the trustees and the executors propounding the will, who represented all the beneficiaries claiming under the will; but only

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those who are named by section 18 are bound by the Act. On the other hand, Mrs. Bagot disputed the will, as well in her own interest as in that of the appellant, the heir-at-law, who, as a minor, was protected by the Court of Chancery in the matter of the compromise.

In the litigation which the Act terminated, the litigants were playing for great stakes a doubtful game. Defeat to the trustees and executors meant the absolute avoidance of the will, and personal liability for everything done under it, and for all the expenses incurred in endeavouring to establish it; with possible additional liability, even in the event of success, for costs which the Probate Court might have ordered them to pay. To the opponents of the will, and to the appellant, defeat meant the loss of all claims under either an intestacy or any prior will, and of all or a great part of the expenses of the opposition. These parties got rid of these liabilities by the statutory compromise, and under it each got, as a certainty, what the Act gave, and no more.

To the litigant widow, section 6 gave £11,000 for herself, and £11,000 for her solicitor, out of the first moneys which came to the hands of the executors, who were also trustees of all the real estates. This £22,000 was, by the express words of section 6, made payable, and was paid, in priority to every demand of the trustees and executors, out of all and every part of the real and personal estates. Section 5 gave a deferred sum of £25,000 with interest to the appellant, in addition to the legacy of £10,000 given to him by the will. Section 3 charged that £25,000 with interest from April 15, 1880, on all the real estates of the testator. These payments—both the £22,000 and the £25,000 alike—were the price of proving the will. They were the consideration for making it operate at all as a will, and I hold it to be perfectly clear that the executors and trustees bound themselves to provide those sums out of all the property which they took under the compromise, before they could retain or apply anything either for their own purposes, or for the benefit of any person claiming under the will who was bound by the Act. The probate in solemn form operated upon the whole property, for the purpose of giving a title to the executors and trustees which would enable them to carry out the compromise. But the first purpose to which that property

was devoted—among all those who were bound by the Act—was the payment of the agreed price of the probate itself—namely, Mrs. Bagot's £22,000 and the appellant's £25,000 and interest. For that price, the compromising executors and trustees bought the residue of the property, and that residue only was to go to those claiming under the will. The annuity of £1000 payable to Mrs. Bagot under the deed of December 19, 1876, was a charge created in the testator's lifetime, and necessarily takes priority of everything chargeable either under the will or under the Act. The annuitants who were not bound by the Act were secured by section 17 in all the same rights as if the Act had not passed. If the Act had not passed, debts and testamentary expenses would, no doubt, have taken priority of these annuities. But the real estates would have been exonerated from the debts and testamentary expenses by the personalty. Though those annuities were primarily payable out of the personalty and out of the rents and profits of the twenty years term, they were also charged by the will on all the real estates except Aughrane, and the annuitants were entitled, if necessary, to have recourse to the *corpus* of all the lands except Aughrane, for payment. By the compromise the executors and trustees, for their own purposes, postponed every payment to themselves to the payments and charges to and for Mrs. Bagot and the appellant. They agreed to this postponement on the terms of saving to the annuitants all their rights by section 17. This saving included the right to be paid out of the rents and profits of the lands charged by the will with the annuities. The annuitants were not bound by the Act, and their rights were not to be affected by the charges, or by the postponement, created by the compromise. Therefore, the annuitants must now be paid before anyone claiming under the compromise can take anything.

The answer to the appellant's claim to priority over the annuitants is not that the annuitants are not affected by the Act. They are not approbating and reprobating the compromise; they are claiming under the terms, and in accordance with the plan, of the statutory compromise which preserved their rights intact. Having regard to what was believed to be the value of the property at the time, it appears certain that the compromising parties

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did not contemplate the possibility of any loss to themselves through leaving the annuitants in possession of all their rights against the lands. It was assumed that the annuities would be paid in any event, and that after paying them ample funds would remain to pay Mrs. Bagot and the appellant all that the compromise provided for them, and to leave a residue which those who claimed under the will and who were bound by the Act were content to take for themselves. Conceding, as I do, that Mrs. Meagher was brought into privity with the settlement of the Act, by her attendance before the Vice-Chancellor on March 25, 1881, this only strengthens her right to insist upon her rights under section 17. The smaller annuitants, being strangers to the compromise and unbound by the Act, must equally retain their rights under the will as proved. Their annuities were terminable, and were expected to be paid out of the rents during the twenty years term, and this accounts for its having been thought unnecessary to bind them by the Act. Subject to the operation of the Statutes of Limitation, which must be ascertained by the Land Judge when the case goes back to him, these annuities must stand in the same priority with Mrs. Meagher's.

These are the only questions which we now decide.

I must explain, from my own point of view, the postponement and reservation of the other questions. The order appealed from is essentially interlocutory. The schedule of incumbrances has not been settled; no sale has taken place, or is in near prospect. It is very doubtful whether the wreck of the Bagot estate will ever provide anything towards payment of the charges *puisne* to those whose priority we now declare. The parties now before us declare themselves ignorant of what has become of the personalty, and of the rents and profits of the twenty years term, which are primarily liable to pay these *puisne* charges in exoneration of the real estate now for sale, and of the rents and profits over which the receiver has been appointed. The Court is now only directing the receiver as to the disposal of these rents and profits. The continuing annuities payable to Mrs. Bagot and to Mrs. Meagher, the arrears of the terminable annuities, if unbarred, the arrears and accruing interest and costs payable to the appellant, and to the mortgagees who were not bound to inquire

into the necessity or propriety of raising the mortgages, or to see to the application of the mortgage-money, will, for several years to come, exhaust all the rents and profits at the disposal of the receiver. Whenever there is a surplus, the Court can make a a further order. In the meantime, and before any sale can take place, the amount and disposal of the personal estate, and of the rents and profits which came, or ought to have come, to the hands of the trustees and executors before the receiver was appointed, can and must be ascertained, and until then it cannot be decided that any of the legacies can be thrown upon the real estates, whether we include in those estates the house and demesne of Aughrane or not. When the lands are sold, and not before, the amount of the *corpus* available to pay the principal of the prior charges can be ascertained. During the same period the Final Schedule of incumbrances can and must be settled, and until all this is done, it cannot be known whether anything will be available to pay either principal or interest of the legacies. At present the accruing income is wholly applicable to discharge the prior charges, and when the sale takes place, the principal of these prior charges must first be paid in full, before the legatees can get anything. Inquiries after the property which has disappeared may, probably, never be profitable to anybody; and their result could, in no possible event, affect the disposal by the receiver of the funds which alone are the subject-matter of the present proceeding. These are sufficient reasons for not now deciding these questions on an interlocutory direction to the receiver. But I am bound to say, for myself, that among the questions which we reserve, there are two, at least, which have been argued here, which seem to me to present great difficulty in the way of the legatees and of the devisee, though I hold myself entirely free to consider and determine them, if it becomes necessary to do so hereafter, or if the legatees or devisee should raise them. But at present, I find it hard, upon the construction of the will, to exclude Aughrane from the "estates" charged with the £10,000 bequeathed to the appellant, in the event of a deficiency in the accumulating fund. Nor am I able to see how either the interest or the principal of the legacies to Bernard William Bagot and Charles Augustus Bagot can be thrown upon the real estates

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other than Aughrane, unless and until the sum for buildings, which the will fixed at £25,000, and which the Act, sect. 12, reduced to £5000, shall have been first provided, with interest, out of the accumulating fund. The words of the will, "in the first place," "in the next place," and "after providing for the said buildings and not before," used as to the building-fund and as to these legacies, must be got over before the conclusion that these legacies have become payable at all under the will can be arrived at. These difficulties, as well as the chances of realizing anything by further litigation, should be considered before any new departure is made in litigation, and the postponement which we make will give time for such consideration, and possibly for the adjustment of doubtful claims.

As to costs, Mrs. Meagher has succeeded *in omnibus*, and therefore must have her costs with her annuity. The appellant has succeeded as to his £25,000 and interest, as against the trustees and executors and the mortgagees for the costs. That was his first and main demand; it was displaced by the order which we reverse; and he must have his costs with it. The mortgagees for the costs derive their title through the executors and trustees; the mortgagee who has the carriage must have his costs with his demand, but these mortgages being executed under the Act, the mortgagee's costs cannot take priority either over the annuitants who are not bound by the Act, or over the appellant whom the Act places first, and we cannot throw these costs either upon the prior incumbrancers or upon the remainderman. To give the legatees or the devisee their costs would be only to make them payable out of their own property derived under the will, and it is not certain that anything remains for them. Besides, they have failed on this appeal. The Representative Church Body are in the same position as Mrs. Meagher, but it is not our practice to allow a second set of costs to parties in the same interest. Therefore all those parties whom I have mentioned must abide their own costs.

Holmes, L.J.:—

The order appealed from settles the priorities *inter se* of ten charges upon the lands to be sold in this matter with the view of

directing the application of the rents which will come from time to time into the hands of the receiver. Although the order will hereafter conclude the parties to it by everything which it decides, it is in a sense provisional, inasmuch as by the practice of the Land Judge's Court a final schedule of incumbrances must be prepared and ruled before the distribution of the purchase-money; and an opportunity will then arise of settling any question now left open. Of the ten charges dealt with in the order, three—two legacies of £5000 each, and a bequest of £10,000, are undoubtedly—I might say admittedly—*puisne* to the others. These sums were given by the will of C. N. Bagot; and a question of some difficulty arises with regard to each of them. It is doubtful whether the legacies of £5000 were charged thereby upon the lands themselves as distinguished from a fund to be accumulated from the rents and other sources during a period of twenty years next following the death of the testator, and also whether they can be paid unless and until the building fund, the first object of the accumulating fund, has been provided—an event which now appears impossible. It is also doubtful whether the bequest of £10,000 is charged upon all his property, or his property other than his mansion-house and demesne lands of Aughrane.

In addition to these questions which have been argued and might be now determined, there is a further difficulty affecting the three sums alike which cannot be removed without further information. It is, I think, clear from the terms of the will that, assuming that the real estate or part of it may in certain events be subject to these legacies, the charge only arises if the accumulating fund be insufficient to pay them, and then merely to the extent of the deficiency. The parties before the Court seem to know nothing about this fund, how it has been applied, or whether it has been applied at all. The testator expected that at the end of the twenty years it would attain to large dimensions, and that a considerable surplus would remain after the sums specifically charged upon it had been met. Doubtless these expectations have been in some measure defeated by the course of events; but there has always been a property producing a good income. Without further information on this subject, it would be impossible to direct that incoming rent should be applied towards the payment of these legacies.

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Moreover, it is certain that for a long time to come the receipts from the lands will not be enough to meet the prior charges; and indeed it is doubtful whether the legacies in question can be ever reached either by rents or purchase-money. For these reasons, I thing it expedient that all questions connected with the two sums of £5000, and with the sum of £10,000, ought to stand over for the settling of the final schedule of incumbrances, when if it is necessary to decide them, something more may be known about the accumulating fund. At the same time I may express a hope that if the parties are satisfied that this fund is now spent or lost beyond recovery, they will not add another chapter to the long history of the Bagot litigation by instituting fruitless inquiries, or by enforcing unnecessary accounts.

I now come to the seven prior incumbrances. Of these the first is a rentcharge created by deed in favour of Mrs. Bagot, now Mrs. Wynne Roberts, by C. N. Bagot, her first husband. This affects only part of the lands; but as regards such part, its priority to the others is not questioned.

The remaining six originated either in the will of C. N. Bagot, or after his death. Probate of this will was sought by B. W. Bagot, and J. A. Holmes, the executors and trustees named therein, and was resisted by the testator's widow. The Bagot case takes a high place amongst the notable causes of this century. After a long, a costly, and a highly sensational trial, the will was condemned by the verdict of the jury; but a new trial, which had been refused by the Judge of the Probate Division, was granted by this Court. The parties prepared to renew the battle; but the stakes had become too high to be risked on the chances of litigation. A compromise was made, the principal terms of which were that Mrs. Bagot and her solicitor were each to receive the sum of £11,000, and that £25,000 should be charged on the estates of the testator in favour of her infant son. It is clear that these several sums were to be paid out of the property of the testator; and no person bound by the compromise would be entitled to receive any of the assets unless and until such payments were made or secured. If this was not the meaning of the transaction, it is absolutely unintelligible. Opposition to probate was bought off by diverting a portion of the

property, which the testator contemplated should pass under his will, to purposes inconsistent with the provisions of that instrument, and at complete variance with his expressed intentions. There has been considerable argument as to the extent to which a compromise of this kind binds persons who are not parties to it.

This discussion has rather surprised me, as I was under the impression that the matter was well settled. At all events my own mind is free from any doubt on the subject.

An executor being the person appointed by the testator to prove and carry out the terms of his will, represents, in any litigation necessary to obtain probate thereof, the beneficiaries; and if he is defeated after an honest contest, a legatee cannot, in the absence of exceptional circumstances, fight the battle a second time. But I am unable to see by what legal principle he can give a portion of the assets to the opposing litigant to buy off his opposition, and claim that all persons who take under the will are bound by what he has done. A compromise of this kind is entered into at the peril of both parties. If the executor has a beneficial interest, such interest will be subject to it. But a beneficiary who stands out will be entitled, when the will is proved, to have the assets applied according to its terms, irrespective of the arrangement entered into prior to the probate.

Of course a person may have assented to a compromise, although he has not signed any document; or, without any actual assent, he may by his conduct at the time render it inequitable for him to challenge it afterwards. But I am speaking of a beneficiary who cannot be proved to have accepted the compromise, either expressly or by implication. In the Bagot Case, the document embodying the terms of agreement was signed by the executors, the widow, and some other interested persons; and, as far as they were concerned, the assets were to be first applied to pay the £22,000, and to secure the £25,000. But infants and unborn children were amongst the principal beneficiaries; and unless they were bound the compromise would be of little value. Hence the necessity of an Act of Parliament, which became law in the year 1881. It charged all the real estates of the testator with the sum of £25,000 in favour of the infant son, directed immediate payment out of the assets of the two

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sums of £11,000, and empowered the executors and trustees to receive their costs and expenses out of the personal estate, and, if it proved insufficient, to raise the deficiency by mortgage of the real estates other than the mansion-house and demesne lands of Aughrane.

One of the questions of priority to be now settled is between two mortgages for £6600 and for £6000 respectively, executed pursuant to this power, and the £25,000 charged in favour of the son.

I cannot doubt that the latter takes priority. The executors and trustees were parties to the agreement, and are bound by the Act. Therefore, so far as they are concerned, any claim to the assets made by them is subject to the payment in full of the price of the compromise.

Mr. Ronan's argument on this point was as misleading as it was ingenious. He said that the Act was to be regarded as a codicil to the will, or as a decree reforming some of its provisions, that the executors and trustees had imposed on them the duty of carrying out trusts created by the combined operation of both instruments, and that the first charge on all the property ought to be the costs attendant on the creation and carrying out of such trusts. If a logician starts from erroneus premises he must expect to arrive at an erroneous conclusion. Mr. Ronan assumes the statute to be what it is not. I regard it as what it is—the legislative sanction of an agreement by which the executors and trustees were to pay out of the personal estate £22,000, and out of the real estate £25,000, in preference to all other charges. Therefore I have no doubt that the cost mortgages are *puisne* to the £25,000.

The remaining incumbrances dealt with by the order appealed from are three annuities—one of £200, given to Mrs. Catherine Meagher during her life, and two charitable annuities, to continue during the period of accumulation—in other words, for the term of twenty years. Unless the executors and trustees had power to defeat these charitable annuities by purchasing a compromise of the litigation with money applicable to their payment, it cannot be contended that they are affected by either the compromise or the statute. Mrs. Meagher knew all about the law-suit—she

was charged therein with undue influence—and her solicitor attended in the Vice-Chancellor's Chambers on the settlement of the draft of the private Bill. But there is no evidence that she approved of the compromise; and the effect of the 17th and 18th sections of the Act is to save to her and to her heirs, executors, and administrators, all estates, rights, titles, claims, and demands, both at law and in equity, which she had or would have if the Act had not passed. Whether she was hostile to the compromise or not, I have no means of knowing, but these provisions are the strongest evidence that she was not bound by it; and it may be that her object in appearing at Chambers on the occasion mentioned was to secure the protection which the statute gave her.

Under these circumstances, I am of opinion that the son, whose title is under the compromise and the Act, can only claim his £25,000, subject to the annuities; and the executors and trustees, who parted with £22,000 of the assets under circumstances, whic has against the annuitants amounted to a *devastavit*, were only entitled to secure their costs by mortgage subject to the annuities, provided the latter were charged by the will on the lands. It has been argued that they are charged on the accumulating fund alone; but the language of the testator does not admit of this construction. The rents, interests, dividends, and annual proceeds of the personal and real estate (except the mansion-house and demesne lands) were vested in trustees in trust to pay debts, funeral and testamentary expenses, and all legacies and annuities given by the will, and subject thereto, in trust to form the accumulating fund.

The annuities are subsequently bequeathed; and the effect of the foregoing words, which in my opinion is not diminished, but rather increased by other passages that follow, is to charge them on the lands in priority to any accumulations.

Accordingly, the charges rank as follows:—first, Mrs. Bagot's annuity, charged on specified lands; secondly, the arrears (in so far as they are not barred by the Statute of Limitations) of the three annuities, ranking *pari passu*, and charged on all the lands except the mansion-house and demesne lands of Aughrane; thirdly, the accruing gales of Mrs. Meagher's annuity, charged on the lands last aforesaid; fourthly, the sum of £25,000, charged on

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all the lands without exception; fifthly, the two cost mortgages, ranking *pari passu*, and charged on the same lands as are subject to the annuities.

Beyond this, our order will not go. Every person interested in the three sums of £5000, £5000, and £10,000, respectively, being bound by the statute, must claim *puisne* to the other charges; and, for the reasons already stated, all questions relating thereto are to stand for the final schedule of incumbrances.

Solicitors for the appellant: *Moore, Keily & Lloyd.*

Solicitors for the petitioner: *Fry & Son.*

Solicitor for the owner: *B. Humfrey.*

Solicitors for the Representative Church Body: *Maunsell & Darley.*

Solicitors for the Protestant Orphan Society: *Kelly & Blake.*

R. D. M.

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lands till sold, and the interest of the sale moneys, and securities, to the husband, &c., with an ultimate limitation as to the lands, or sale moneys, and portion of the securities, for the husband, his heirs, executors, administrators, and assigns. The settlement contained a power to lay out the trust funds in the purchase of hereditaments, and it was thereby declared that the hereditaments so to be purchased, and the said lands, should be considered for all the purposes of the settlement as personal estate only. The lands had been recently bought by the husband; part of the purchase-money was paid out of the wife's fortune, and the settlement contained provisions for securing the repayment of same in certain events. The lands were not sold, and the ultimate limitation took effect:—*Held*, that there was no conversion of the lands, and that they passed, on the death of the husband, as real estate to his heir-at-law. *MccGwire* v. *MccGwire* [V.-C. 200

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Government paying to the suppliants the rent of £4 14*s.* 6*d.* per annum, being at the rate of £3 10*s.* per statute acre. On the 4th July, 1804, the suppliants granted to *J. M.* and *J. B.* a lease of 2A. 2R. 3P. (Irish) of the lands, which comprised lot 89, for three lives or thirty-one years from the 31st May, 1803, and by deed dated 7th April, 1809, *J. M.* assigned lot 89 to *F.* for the Crown for the public service for all the residue of *J. M.*'s interest. The land so taken was originally agricultural land, upon which the War Department erected batteries and other buildings, and the Crown regularly paid the rent of £4 14*s.* 6*d.* to the suppliants until 1896, when the Crown served notice of surrender of the land. The suppliants filed a petition of right, claiming either that the Crown should pay the rent or remove the buildings and restore the lands to their original condition, or pay compensation for the damage done; or, in the alternative, that the War Department, having acquired the tenant's interest in the lands only, were bound by the ordinary terms of the tenancy to restore the lands to their original condition on the termination of the tenancy:—*Held* (affirming the decision of the Master of the Rolls, *dissentiente* Fitz Gibbon, L. J.), (1) that there was no obligation on the Crown under sect. 11 of 44 Geo. 4, c. 55, to restore the land to its original condition, or to give compensation for the damage done; (2) that the Crown were not bound by any implied obligation under the law of landlord and tenant to surrender the lands in the same condition in which they were at the time possession was taken. *Incorporated Society for promoting Protestant Schools in Ireland* v. *Reg.* [APP. 464

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that the owner in fee of the land subject to said right of the inhabitants of Fermoy could not encroach on the walk (*a*) by granting to his tenants of other lands abutting thereon a right to pass over the walk in carriages, unless such grant were subject to the condition that the use of the inhabitants should not be thereby interfered with, or (*b*) by converting the walk into a public road to be traversed by all kinds of vehicles. Distinction between the right to use a place as a promenade possessed by the inhabitants of a district, and a right of way over a place on foot possessed by the public. *Abercromby* v. *Town Commissioners of Fermoy* - - - - - - APP. 302

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EXECUTOR — *Liabilities — Action for damages for fraudulent misrepresentation—Judgment against defendant directing an inquiry for the purpose of ascertaining amount of damages—Appeal by defendant—Death of appellant pending appeal*—"Actio personalis moritur cum persona."] The plaintiff brought an action against several defendants alleging that by their fraudulent misrepresentations he had been induced to take shares in a Company promoted by them which proved to be valueless, and claiming damages. The Master of the Rolls held that the plaintiff had been induced by the fraudulent misrepresentations of certain of the defendants to take the shares in question, and held the said defendants answerable for the plaintiff's loss: his judgment ordered the said defendants to pay to the plaintiff the amount paid by him in respect of the shares with interest less by the value of the shares, and he directed an inquiry to ascertain the value of the shares. The said defendants appealed from this judgment, two of them joining in their appeal, the others appealing separately. After the appeals were opened, and before the arguments were concluded, one of the two appellants who joined in their appeal, died:—*Held*, that the rule *actio personalis moritur cum persona* applied,

EXECUTOR—*continued.*
and that the proceedings could not be continued against the personal representatives of the deceased appellant. *Davoren* v. *Wootten* - APP. 273
EXPERT EVIDENCE — Costs, party and party - - - - - - 22
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EXPIRATION OF PATENT—Importation of patented articles—Damages - 287
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FINE — Lease — Solicitors' Remuneration Act, 1881 - - - - - - 1
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See LAND LAW (IRELAND) ACTS. 1. [139
HUSBAND AND WIFE—Settlement.
See SETTLEMENT.
IMPROVEMENTS—Buildings—Adjustment of rent - - - - - 255, 260
See POOR RATE.
—— Loan for—Priority — Eviction of part of estate charged—*Lis pendens* - 328
See LOAN FOR IMPROVEMENTS.
INFRINGEMENT OF PATENT—Expiration —Importation of patented articles—Measure of damages - - 287
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INSTALMENT MORTGAGE—Payment of instalment by successive tenants for life —Priority - - - - - 298
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INTEREST ON MONEY — Bond—Penalty
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—— Rate of—Mortgage—Judgment—Merger
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—— Statutory power to mortgage tolls—Priority
See PRIORITY. 3. [85, 103
INTERLINEATIONS—Deed—Presumption
See RESULTING USE. [178, 192
ISSUE—*Will—Construction—Gift to five legatees —Remainder to eldest male issue—Gift over in default of such issue—Vesting*—Persona designata.] A testator bequeathed his property to trustees upon
ISSUE—*continued.*
trust that the rents and profits should be divided into five equal parts, to be paid half-yearly to each of his five nephews, share and share alike, "to be by them enjoyed during the period of their natural lives, and after the decease of each to their eldest male issue, respectively, of each, and in default of such male issue such share to revert to the remaining legatees, or their eldest male issue, to be divided equally every half-yearly term among them." All the testator's nephews survived him. Three of them died subsequently, intestate and unmarried; one (the husband of the plaintiff) died, having had a son who predeceased him, intestate and unmarried; and the fifth nephew was still alive:—*Held*, by Porter, M.R., (1) That the gift of the income of the property amounted to a gift of the *corpus*; (2) That the gift after the decease of each to their eldest male issue, respectively, of each, meant to the eldest male issue living at the decease of each; (3) That the words "remaining legatee" meant surviving legatee, and that accruing shares went absolutely to such legatee; (4) That the plaintiff was entitled, pursuant to the foregoing declarations, as personal representative of her husband, *F. S.*, to his accrued shares of the personalty, but as representative of her son she took nothing.—*Held*, on appeal, as to the 2nd declaration of the decree, and as to so much of the 4th declaration as declared that as personal representative of her son the plaintiff took nothing (varying the decree of Porter, M.R.), that the son of *F. S.* took a vested interest at birth, and that the gift to him was a gift to a *persona designata*, and not to a class. *Sheridan* v. *O'Reilly* - - - APP. 386
JOINTURE.
See ANNUITY.
JUDGMENT—Directing inquiry as to damages —Action for fraudulent misrepresentation —Appeal—Death of appellant - 273
See EXECUTOR.
—— Mortgage debt—Merger—Interest 85, 103
See MERGER.
—— Registered as mortgage—Accrual of right [316, 319
See LIMITATIONS, STATUTE OF.
JURISDICTION— Reviewal of taxation—Railways Act, 1864, s. 12—G. O. LXV., R. 65
See TAXATION OF COSTS. [33
—— Service out of.
See SERVICE OUT OF THE JURISDICTION.
LAND LAW (IRELAND) ACTS — *Agricultural or pastoral holding—Court tenant—Portion of mansion house and demesne—Land Law Act*, 1896, *sect.* 40.] Portion of the mansion house, yard, and offices of Hollywood House, together with 190 acres, of which 40 acres were ornamental plantation, was held by a Court tenant:—*Held*, that it was not an agricultural or pastoral holding,

LAND LAW (IRELAND) ACTS—*continued.*
and so was outside sect. 40 of the Land Law Act, 1896. *In re Harrison's Estate*; *Kirk, Petitioner* [Ross, J., 139

2. —— *Court letting—Owner in occupation under a deed of covenant—Land Law (Ireland) Act, 1896, sect.* 40.] Under an order of the Court an owner entered into a deed of covenant with the petitioner and a receiver acting under deed, to pay £100 and certain head rents for the use and occupation of certain premises, therein described as "demised premises." Upon a receiver being appointed by the Court a similar deed of covenant was, under an order of the Court, entered into by the owner with the trustees of the petitioner and the receiver:—*Held*, that the owner was not a tenant within sect. 40 (2) of the Land Law (Ireland) Act, 1896, and not entitled to be included in the request rental. *In re Lawder's Estate*; *Thompson, Petitioner* [Ross, J., 206

3. —— *Redemption of annuity—Land Law (Ireland) Act, 1896, sect.* 31 (1) (8).] An annuity secured by a term of years is a superior interest, and the owner of the annuity is entitled to be paid the capitalized value on its being redeemed. *In re Alexander's Estate*; *Mulville, Petitioner* [Ross, J., 20

4. —— *Redemption of jointure — Compulsory power, or discretion—Land Law (Ireland) Act, 1896, sect.* 31.] An estate was sold in the Land Judge's Court in fourteen lots, four of which, Nos. 2, 3, 7 and 14, were charged with a jointure of £200 a year. By an order dated the 1st November, 1895, it was ordered that the lands should be sold discharged of the jointure, and that the jointress should have the same rights against the proceeds of the sale of the lands as she would have had against the lands. Lots 7 and 14 were sold under the ordinary jurisdiction of the Land Judge, and after the passing of the Land Law Act, 1896, lots 2 and 3 were sold under the 40th section of the Land Law Act, 1896, to the tenants. By order dated the 8th December, 1899, it was ordered that the jointure should be apportioned between lots 2 and 3 on the rental, and lots 7 and 14, and that the part so apportioned in respect of lots 2 and 3 should be redeemed:—*Held* (by the Lord Chancellor, and Walker and Holmes, L.JJ., *dissentiente* Fitz-Gibbon, L.J.), that the jointure was a "superior interest" within the meaning of sect. 31 of the Land Law Act, 1896, and that it was compulsory to redeem so much of it as was apportioned on the part sold to the tenants under the 40th section. *Alexander's Estate* ([1900] 1 I.R. 20) approved of and followed (*dissentiente* Fitz Gibbon, L.J.). *In re Trustees of Owen's Estate (No. 3)* - App. 151

5. —— *Superior interest—Rentcharge—Redemption or apportionment of.*] A rentcharge was charged on *A* and *B*, the former of which was not for sale. As between *A* and *B* the rentcharge was primarily charged on *B*. An application being made to the Land Judge to redeem it out of the purchase-money of *B*, the owner of the rentcharge opposed, and the order for redemption was refused. *In re Gabbett's Estate*; *Gabbett, Petitioner* [Ross, J., 198

LAND LAW (IRELAND) ACTS—*continued.*
—— Buildings declared to be tenant's improvements —Poor rate—Adjustment of rent
See POOR RATE. [255. 260

LANDLORD AND TENANT—Adjustment of rent — Local Government Board Act, 1898, s. 54, sub s. 1 — Buildings — Tenant's improvements—Poor rate
See POOR RATE. [255, 260

—— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.

—— Lease.
See LEASE.

—— Mortgagee owner of worthless equity of redemption — Successful resistance of tenant's claim to reduce rent - 295
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—— Surrender by the Crown—Defence Acts—Compensation - - - 464
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See RESIDUARY GIFT. 1.

—— Two residuary gifts—Words "not hereinbefore disposed of" - - 342
See RESIDUARY GIFT. 2.

LEASE — Buildings — Solicitors' Remuneration Act, 1881 - - - - 137
See TAXATION OF COSTS. 3.

—— Covenant to renew within limited periods—Neglect by tenant to nominate new life
See COVENANT TO RENEW. [417, 428

—— Fine—Rack rent—Solicitors' Remuneration Act, 1881 - - - - - 1
See TAXATION OF COSTS. 4.

LEGACY—Gift over on contingency which does not happen - - - - - 56
See ABSOLUTE INTEREST. 2.

LIMITATIONS, STATUTE OF—37 & 38 *Vict. c.* 57, *s.* 8 — *Judgment — Judgment mortgage*—13 & 14 *Vict. c.* 29, *s.* 7.] Where a judgment creditor registers a judgment as a judgment mortgage against the lands of a judgment debtor:—*Held* (by the Court of Appeal, reversing the decision of the Vice-Chancellor), that the Statute of Limitations commences to run from the date of the judgment, and not from the date of the registration of the judgment mortgage. *Johnson* v. *Lowry* [V.-C. 316; App. 319

LIS PENDENS — Registration of petition for sale—Priority - - - - 328
See LOAN FOR IMPROVEMENTS.

LOAN FOR IMPROVEMENTS — *Board of Public Works—Two portions of land charged—Liability of one portion for the whole on the other portion being evicted* — Lis pendens.] In 1876 proceedings for the sale of certain lands—*A*, *B*, and *C*—in the Landed Estates Court were registered as a *lis pendens*. Nothing was done under those proceedings after 1879. In 1880 the owner applied to the Board of Works for a loan on those lands under the Landed Property Improvement (Ireland) Act, 1847, which was duly made. In 1887 the landlord of *B* and *C* recovered possession of *B* and *C* in an ejectment for non-payment of rent. Another petition, for the sale of *A*, was subsequently filed:—*Held* (1), that the whole of the Board of Works loan was charged on *A*, with its statutory priority; and (2) that the previous registration of the *lis pendens* did not affect the loan, as it derived its validity, not from the owner, but from the statute under which it was charged. *In re Nunan's Estate*; *M'Carthy*, *Petitioner*
[Ross, J. 328

LOCAL GOVERNMENT ACT—Adjustment of rent - - - - 255, 260
See POOR RATE.

LUNATIC—Pauper—Scotch *curator bonis* 349
See PAYMENT OUT OF COURT.

MAINTENANCE — Pauper lunatic — Scotch *curator bonis* - - - - 349
See PAYMENT OUT OF COURT. 1.

MANUFACTURER—Trade name - 43
See TRADE NAME.

MERGER — *Mortgage—Rate of interest—Judgment—Covenant.*] A mortgage deed contained a covenant by the mortgagors for payment of the principal sum on a day named, with interest in the meantime at £5 per cent. per annum, and also, if the principal sum should not be then paid, that so long as the same, or any part thereof, should remain unpaid, the mortgagors would pay interest half-yearly at the same rate for the said principal sum, or so much thereof as should, from time to time thereafter, remain unpaid. The mortgagors having made default the mortgagees recovered judgment against them for principal and interest on the covenant. *Held*, by the Court of Appeal (affirming the decision of the Master of the Rolls), that the covenant merged in the judgment, and that the mortgagees were, therefore, entitled only to £4 per cent. interest on the judgment debt, and not to £5 per cent. interest on the principal sum under the covenant. *Popple* v. *Sylvester* (22 Ch. D. 98), *Ex parte Fewings* (25 Ch. D. 338), and *Lowry* v. *Williams* ([1895] 1 I. R. 274), discussed and applied. *Query*: Whether, when a judgment is obtained for an amount of principal and arrears of interest, upon which interest at 4 per cent. would be more than the amount of the interest on the

MERGER—*continued.*
original principal debt at the contract rate, any excess can be recovered out of the security. *Usborne* v. *Limerick Market Trustees* (*No.* 2)
[M. R. 85; APP. 103

MORTGAGE—*Settled land — Instalment mortgage—Tenants for life—Payment of instalments—Sale—Deficiency of proceeds—Rateable repayment.*] A testator devised certain lands, subject to an instalment mortgage, to his wife for life, remainder to his children for life, remainder over. After the testator's death his widow paid several instalments on foot of the mortgage. She died intestate, and further instalments were then paid by the other tenants for life. The lands were sold under the Settled Land Act, and the balance of the mortgage paid off out of the proceeds; and by an order of the Court the tenants for life were declared entitled to be recouped the sums, expended by them on foot of the mortgage, out of the remaining surplus of the purchase-money. The fund proving insufficient to repay the tenants for life in full:—*Held*, that the several tenants for life were entitled to be recouped rateably, the first tenant for life having no right to be repaid the sums, expended by her on foot of the mortgage, in priority to the other tenants for life. *In re Nepean's Settled Estate* - - - - V.-C. 298
—— Costs of enforcing - - - 15
See PRIORITY. 2.
—— Covenant—Recovery of judgment on—Rate of interest - - - - 85, 103
See MERGER.
—— Debentures
See DEBENTURES.
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—— Interest — Statutory borrowing powers — Trustees of market—Priority 85, 103
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—— Mortgagee owner of worthless equity of redemption — Costs incurred in resisting tenant's claim to reduce rent - 295
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NEXT-OF-KIN — Of wife — Death without having been married - - 332
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—— To lodge deeds—Service out of the jurisdiction—Practice, Land Judge - 82
See SERVICE OUT OF THE JURISDICTION.
ORDERS, GENERAL—1884, 16th April (Solicitors' Remuneration Act, 1881), Sched. I., Part II., Rule 5 - - - 1, 137
See TAXATION OF COSTS. 34.
—— 1893, July (Supreme Court), LXV., Rule 64 - - - - - - - 22
See TAXATION OF COSTS. 2.
—— —— LXV., Rule 65 - - - - 33
See TAXATION OF COSTS. 1.
OWNER—Court letting - - - 206
See LAND LAW (IRELAND) ACTS. 2.
PATENT—*Infringement—Importation of patented articles before and after expiration of patent—Loss—Measure of damages.*] The plaintiffs were the owners of a patent of the United Kingdom for improvements in the insulation of electric cables. The defendant Company entered into a contract, during the continuance of the patent, with an American Company for the supply of cables, similar to those protected by the patent, some of which were delivered to the defendant Company during the continuance of the patent, the remainder being delivered after its expiration. It was conceded at the trial that the delivery of cables by the American Company to the defendants during the continuance of the patent constituted an infringement, but a question having arisen as to how the damages were to be measured:—*Held*, that the damages should be awarded only upon the cables actually delivered during the continuance of the patent, and should not be extended to the whole profit which might have been made if the contract had been entered into with the plaintiffs instead of with the American Company. *British Insulated Wire Co.* v. *Dublin United Tramways Co. and others* - - - - - - V.-C., 287
PAUPER—Lunatic—Scotch *curator bonis*
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PAYMENT—Settled trust funds—Postponement for convenience of estate—Vesting 129
See ABSOLUTE INTEREST. 1.
PAYMENT INTO COURT—*Legacy—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53) *sect.* 42—*Payment into Court of legacy—Discretion of trustee.*] A testator directed his executors and trustees thereinafter named to invest a sum of £1100 and apply the income in payment to his son *A* of a weekly sum for maintenance, with a half-yearly allowance for clothes, until they should be of opinion that it would be prudent to pay him the principal, with a gift over in the event of *A* dying before receiving the principal. The income of the £1100 was applied as directed by the executor who proved the will, and after his death by his executors, who afterwards paid the principal into Court under the
PAYMENT INTO COURT—*continued.*
Trustee Act, 1893. *A* applied for payment out:—*Held*, that the payment into Court deprived the executors of the executor of any discretion they had as to payment of the principal. *A* having consented to the settlement of the fund for the benefit of his wife and children, the fund was ordered to be paid out to the trustees of a proper settlement, when appointed. *In re Murphy's Trusts* [M. R. 145
PAYMENT OUT OF COURT—*Pauper lunatic—Maintenance—Scotch* curator bonis.] Money to which a pauper lunatic, maintained by a Scotch parish council, became entitled on an intestacy was paid into Court under the Trustee Act, 1893. An inspector of poor, appointed by the Sheriff Court *curator bonis* to the lunatic, applied for payment out of the entire fund with the object of applying portion of same in discharge of the past maintenance of the lunatic, and of retaining the residue towards his future maintenance:—*Held*, that the *curator bonis* had not an absolute right to payment; that the Court had a discretion as to paying out the fund, and was bound to exercise that discretion in the interest of the lunatic. Order made for payment of portion of the capital in respect of past maintenance, and for quarterly payments out of income and capital during the life of the lunatic. *In re Hill* - - - - V.-C. 349
2. —— *Puisne incumbrancer—Wasting security—Life estate with policy of insurance.*] A sum of money, representing surplus rents of the lands for sale (a life estate with policies of insurance as a collateral security) was in Court. A puisne incumbrancer, assignee of an English judgment, extended to Ireland under the Judgments' Extension Act, 1868, and registered as a mortgage, applied to have it paid out to him in part payment of his debt, on the ground of the security being a wasting one. The prior incumbrancers, to whom interest was paid to date, and who made no claim for the money, objected, impugning the validity of the statutable mortgage founded on the English judgment; also on the ground that their mortgages were on a wasting security, the policies being possibly voidable; and also on the ground that owing to the application of the 40th section of the Land Act, 1896, this money might be required for the redemption of superior interests. *Held* (without deciding the question of the validity of the statutable mortgage), that the application should be refused. If sufficient money were in Court it would be properly applicable to the satisfaction of the prior incumbrancers. *In re Cox's Estate*; *Farrell, Petitioner* - - - - Ross, J., 269
PENALTY—Bond—Payment of interest 372
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PERPETUITY—Appointment - - 354
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PERSONA DESIGNATA—Eldest male issue—Will—Vesting - - - 386
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PETITION FOR SALE—Registration as *lis pendens* - - - - - - 328
See LOAN FOR IMPROVEMENTS.

POOR RATE—*Landlord and tenant—Rent—Adjustment under Local Government Act*, 1898—*Buildings declared by Land Commission to be tenant's improvements.*] The fact that the buildings on a holding have been declared by the Land Commission to be the tenant's improvements, does not prevent the tenant of an "existing tenancy" from making the deductions from his rent, in respect of such buildings, authorised by sect. 54, sub-sect. 1, of the Local Government Act, 1898. *King-Harman* v. *Cayley* - Ross, J., 255; APP. 260
—— Deduction from tithe rentcharge - - 68
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POWER—*Execution—Excessive appointment—Appointment to object for life, with power to appoint by will—Perpetuity—Appointment to A of dividends on securities from January to July, and to B of dividends from July to December—Corpus.*] By a marriage settlement certain funds were vested in trustees, upon trust, after the deaths of the husband and wife, for the children of the marriage, or the issue of such children, who might die leaving issue, as the husband should by deed or will appoint, and, in default of such appointment for such children equally. The wife having died, the husband by will appointed that the trustees of the settlement should stand possessed of the trust funds, as to £2000 part thereof for his daughter *M.*, upon the same trusts as were thereinafter declared in respect of her share of his personal estate. He bequeathed his general personal estate to trustees upon trust to realize and pay debts, &c., and bequeathed £2000 to *M.*, and directed his trustees to retain the said sum, and also the £2000 thereinbefore appointed to her, with power to invest same for her benefit, and to pay the annual proceeds thereof to her for life on her separate receipt, without power of anticipation, and after her decease to pay the principal as she should by will appoint, and in default of appointment to pay same to her next-of-kin, with power to his trustees to hand over the principal to the trustees of any settlement which might be executed in the event of her marriage. He made a codicil, and thereby appointed to his said daughter an additional £800, revoked her legacy of £2000 and in lieu thereof bequeathed to her £1200, and directed that the sums to which she should become entitled under the will and codicil, whether by appointment or bequest, should be held by the trustees of his will upon the like trusts for the benefit of his said daughter as were in his will declared concerning the sums by it appointed and bequeathed to her:—*Held*, following *Wollaston* v. *King* (L. R. 8 Eq. 165), that the appointments of the £2000 and £800 were inoperative beyond the life interest appointed to *M.*, and that on her death these sums passed under the settlement as unappointed. *M.* made her will, and thereby bequeathed to *C.* all the dividends paid into bank to her account from January to July (specifying certain securities), and to *L.* the corresponding dividends payable from July to December. It was shown by evidence that the securities mentioned represented the £1200 legacy in her father's will:—*Held*, that the capital was appointed equally between *C.* and *L.* *Tredennick* v. *Tredennick* [V.-C. 354
—— Sale—Real estate—Declaration that lands should be considered personal estate
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PRACTICE — Administration — Surety — Insurance Company—Premium paid to—Allowance out of estate - - 292
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—— Costs.
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—— Land Judge—Life estate—Receiver—Arrears—Discharge - - - - 18
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—— Land Judge—Notice to lodge deeds—Service out of the jurisdiction - - 82
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—— Land Judge—Owner in occupation—Covenant to pay rent—Whether Court letting 206
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—— Land Judge—Superior interest—Redemption [20, 151, 198
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—— Land Judge—Transfer of carriage—Solicitor's lien - - - - - 211
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—— Payment out of Court—Scotch *curator bonis*—Pauper lunatic - - - 349
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—— Taxation of costs.
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—— Winding up—Company—Proof of debt—Period of ascertainment - - 324
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PREMIUM—Insurance Company—Administrator's bond—Allowance out of estate 292

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PRIORITY—*Compromise of litigation in Probate Court—Sum of money paid to enable will to be proved—Costs of suit—Mortgage for costs.*] *C. N. B.*, by his will, left all his property to trustees upon trust that the rents and profits of his real estate (other than the house and lands of *A.*), and the profits of his personal estate, should be applied in payment of the charges that might affect his real estate, and all other his debts, his funeral and testamentary expenses, and all legacies and annuities given by his will, and subject thereto he directed the trustees to accumulate for twenty years the profits of his personal estate and the rents of his real estate (other than the lands of *A.*) so far as not required for the purposes aforesaid. The testator devised the house and demesne of *A.* to his brother *J. L. B.* for life with remainder to his eldest son for life with remainder in tail male; remainder to his brother *B. W. B.* for life with like remainders; with remainder to his brother *C. A. B.* for life with like remainders. The trusts of the accumulating fund were to raise £20,000 for buildings at *A.*, then to pay to each of his brothers *B. W. B.* and *C. A. B.*, £5000 at such time as the trustees should think fit. He left his sister Mrs. *M.* an annuity of £200 a-year for her life, £100 a-year to the Protestant Church at Ballygar, and £10 a-year to the Protestant Orphan Society. Subject to aforesaid gifts, and after payment thereof, he directed his trustees to raise for *W. H. N. B.* £10,000 out of the accumulating fund, and if that was insufficient, out of his estates which he charged therewith, to be paid to him at the age of thirty. Subject thereto, the accumulating fund was to be laid out in the purchase of real estate, and settled upon the same trusts as the lands of *A.* *C. N. B.* having died, his widow disputed the will in a suit of *B.* v. *B.*, which resulted in the will being condemned. A new trial was directed by the Court of Appeal. When the case was coming on for a second trial, a compromise was effected, which was embodied in a consent, and confirmed by a private Act of Parliament. By the terms of the consent and the private Act, the estates were to be charged with £25,000 for *W. H. N. B.*, a minor, in addition to the £10,000 given by the will, not to be raisable till the minor attained age; £11,000 was to be paid to Mrs. *R.*, the testator's widow, who had married a second time, and £11,000 to *K.*, her solicitor, for costs. The amount to be spent on building was reduced to £5000; and the costs and expenses of the executors and trustees were to be paid out of the assets, and in case the personal estate was not sufficient, the trustees were empowered to raise the amount by mortgage of the fee of the real estates (other than *A.*). The two sums of £11,000 were paid to Mrs. *R.* and to her solicitor, and other sums were paid out of the personal estate, which ultimately proved insufficient for payment in full of the costs. Two mortgages for costs were charged on the estates by the executors for £6000 and £6500. On the minor coming of age in 1897 a petition was presented to the Land Judge's Court to raise his charge, and a receiver was appointed. When he had collected a year's rent an application was made to the Court for an order fixing the priorities in which the rents were to be paid:—*Held* (varying the decision of Ross, J.), that the order in which the interest should be paid was (after the annuity of £1000 a-year for Mrs. *R.*, the priority of which was not disputed)—(1) the arrears of the three annuities, ranking *pari passu*, and charged on all the lands except the lands of *A.*; (2) the accruing gales of the annuities; (3) the £25,000 charged on all the lands for the minor; (4) the two mortgages for costs, charged on all the lands. *In re Bagot's Estate* - - - - - - APP. 496

PRIORITY—*continued.*

2. —— *Mortgage—Priority of costs of enforcing mortgagee's claim*]. The costs incurred by a person entitled to an annuity and charge on an estate in successfully enforcing his claim against the owner, who resisted it, take the same rank as the principal sum. *In re Baldwin's Estate; Wright, Petitioner,* [ROSS, J., 15

3. —— *Mortgage of tolls—Interest of prior and puisne mortgages made a first charge by local Act—Interest of puisne mortgage taking priority over principal sum secured by earlier mortgage—Limerick Market Acts*, 1852, 1862, 1872 (15 *Vict. c. civ.*, 25 *Vict. c. xxiii.*, 35 & 36 *Vict. c. xcvi.*] As an ordinary rule, when lands are pledged to secure a debt as a first charge, the owner of the mortgage is entitled to principal and interest out of the security as against the mortgagor and his assigns, and in priority to any claim by him or them. But where, by successive local Acts of Parliament, passed in the year 1852 and 1862, power to borrow money was given to trustees of a market upon the security of the tolls, and it was provided by the later Act that "the interest on the said sum of £30,000, authorised to be borrowed under the Act of 1852, and the interest on the sum of £10,000, authorised to be borrowed under this Act shall be a first charge on the tolls," it was held by the Court of Appeal, affirming the Master of the Rolls, that the interest secured by the puisne mortgages effected under the later Act took priority over the principal secured by the prior mortgages effected under the earlier Act. *Usborne* v. *Limerick Market Trustees* [M.R. 85; APP. 103

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—— Poor rate—Deduction from tithe rentcharge
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RECEIPT—Compensation—Compulsory purchase
See RECEIVER. 2. [144
RECEIVER—*Land Judge's Court—Practice—Life estate—Termination—Discharge of receiver over land, but retention over arrears.*] An absolute order for sale of a life-estate had been made, and a receiver appointed. The owner died, and at his death there were arrears of rent due. Upon motion by the person next interested in the lands as owner to discharge the receiver:—*Held*, that he should be discharged from over the land, but retained over the arrears of rent. *In re Assignees of Osborne's Estate; North British Mercantile Insurance Co., Petitioners* - - - - - Ross, J., 18
2.——*Receipt for compensation, under £20, for land taken under Labourers Acts.*] The Land Judge authorized the Receiver to give a receipt, under Schedule II., No. 19, of the Housing of the Working Classes Act, 1890, for money paid as compensation for land taken under the Labourers (Ireland) Acts. *In re Garnett's Estate* Ross, J., 144
RECOVERY—Declaration of uses 178, 192
See RESULTING USE.
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REGISTRATION—Judgment mortgage 316, 319
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RENTCHARGE.
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TITHE RENTCHARGE.

RESIDUARY GIFT—*Lapsed and revoked shares of particular residue—Gift to wife and children then living—Class.*] A testator bequeathed certain articles consisting of works of art, &c., specifically to individuals, and directed that all his furniture, . . . objects of art and household goods, not by his will or any codicil thereto otherwise bequeathed, should be sold within six months after his decease, and that the money arising from the sale should be divided equally between his wife and all his children then living, share and share alike; and after other dispositions he bequeathed the residue of his property to one of his children. By a codicil he revoked all gifts to another child *D.* The specific legatees and the testator's wife died in his lifetime:—*Held*, 1, that the specific legacies fell into the particular residue; 2, that the shares of the wife and *D.* of that residue did not pass to the general residuary legatee, but went to the children, other than *D.*, living at the period of distribution. *M'Kay* v. *M'Kay* - - - V.-C. 213

2.—— *Residuary gift of property "not hereinbefore disposed of"—Second residuary clause—Lapsed legacies and devises—Whether captured by first or second residuary clause.*] A testator, after several legacies and devises of land, which failed, devised and bequeathed to his executors on certain trusts the remainder of his property, which he described as follows:—"All my railway and other shares, stocks, and interest in companies, moneys in the funds, dividends and debts due to me at the time of my death, and also the rest of my estate and effects, real and personal, *not hereinbefore disposed of*, and all securities, bonds, coupons, cash in bank or elsewhere." At the end of his will he appointed *C. S.* his residuary legatee:—*Held*, that the words of the first general residuary clause were sufficiently wide to capture not only property undisposed of, but also lapsed legacies and devises, although there was apparently in that case nothing left for the second residuary clause to operate upon. *Johns* v. *Wilson* - - - - V.-C. 342

RESULTING USE—*Interlineation and alteration in a deed—Presumption—Evidence—Recovery by tenant in tail—Declaration of uses.*] When uses are declared upon a recovery by a tenant in tail, which do not exhaust the fee, the use so far as unexhausted results to the recoveror. *Tanner* v. *Radford* (6 Sim. 21), explained and followed. By

RESULTING USE—*continued.*
settlement dated 29th October, 1800, executed on the marriage of *P. L.* and *J. L.*, the lands of *B.* were granted to trustees to the use of *P. L.* for life with remainder to the use of the first and every other son of the marriage in tail male with remainders (as was held by the Court) to the heirs male of *J. L.*, *T. L.*, and *P. L.* (uncles of the husband). In 1833, *C. L.*, the eldest son then living of *P. L.* and *J. L.* married, and two deeds were then executed, both dated the 10th June, 1833. By the first of these, after reciting that *C. L.* was desirous of barring the entail and acquiring the fee for the purposes thereinafter mentioned, *P. L.* and *C. L.* granted the lands to *G.* for the joint lives of *P. L.* and *G.* to the intent that the said *G.* might become tenant of the freehold of the said lands in order that a recovery might be suffered. It was thereby declared that after judgment should have been obtained and seisin taken upon such recovery, the lands should enure to *W. J.* and *P. J.* in fee-simple for the uses of the settlement of equal date and for no other uses or purposes whatsoever. By the settlement of equal date, the lands were conveyed to *W. J.* and *P. J.* in fee simple, to the use of *C. L.* for life, with remainder in tail male, with divers remainders over, but the settlement did not contain any ultimate limitation of the fee. It declared the uses of the recovery to be that the estate tail of *C. L.* and all reversions and remainders over might be barred, and that after judgment upon the recovery the lands should enure to *W. J.* and *P. J.* for ever for the uses and trusts thereinbefore expressed, and for no other use, intent, or purpose whatsoever. A recovery was duly suffered. *C. L.* died in 1897, without issue, and all the other remainders under the settlement of 1833 failed. The plaintiff as heir of one of the remaindermen in the settlement of 29th October, 1800, brought an action against the devisees under the will of *C. L.*, claiming to be entitled on the ground that as there was no limitation of the fee contained in the settlement of 10th June, 1833, the recovery only barred the entail for the purposes of the settlement, leaving a resulting use in favour of the prior settlement:—*Held* by the Court of Appeal (affirming the decision of Porter, M.R.), that the estate tail was barred absolutely, and the ultimate use in fee resulted to *C. L.* *Lynch* v. *Clarkin* M. R. 178; App. 192

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See Residuary Gift. 1.

SALVAGE CLAIM—*Costs incurred by mortgagee, also owner of worthless equity of redemption, in reversing order of Sub-Commission reducing the rent of a tenant on the estate.*] Costs incurred by a mortgagee in successfully appealing against an order of a Sub-Commission Court reducing the rent of a tenant on the estate, constitute a good salvage claim; and the fact that the mortgagee

SALVAGE CLAIM—*continued.*
became the owner of the equity of redemption—which was worthless—does not alter the position of the salvagor. *In re M'Donnell's Estate*; *Quinlan, Petitioner* - - - - Ross, J., 295

SCOTCH LAW—Pauper lunatic—*Curator bonis*
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SERVICE OUT OF THE JURISDICTION—*Land Judge's Court—Practice—Notice to lodge deeds.*] The service out of the jurisdiction of an order to lodge deeds is invalid, and an order for attachment founded thereon cannot be made in the event of disobedience. *In re Trustees of Synge's Estate*; *Davis, Petitioner* - Ross, J., 82

SETTLEMENT — *Wife's property — Ultimate trust for next-of-kin of wife—Words "die without having been married"—Infant child.*] By a marriage settlement a sum of money to which the wife was entitled on the death of her mother was settled upon trust to pay the income to the husband for life, then to the wife for life, and after the death of the survivor in trust for the children and remoter issue as the husband and wife or the survivor should appoint, and in default of appointment to the children equally, if sons on attaining twenty-one years, or if daughters on attaining that age or marrying under that age. In default of issue attaining vested interests, the fund was to be held in trust for the wife absolutely if she survived her husband, but if she predeceased him, then upon such trusts as she should by will appoint, and in default of appointment, in trust for the person or persons who under the statutes for the distribution of the effects of intestates would on the decease of the said wife have been entitled thereto, if she had died possessed thereof intestate and without having been married. There were three children of the marriage, all of whom died under age and unmarried. No appointment was made by husband or wife. The wife predeceased her husband, leaving him and two of the three children surviving, and her only next-of-kin other than the children being her mother and two brothers. The husband survived his wife's mother and his two children, and married again. By his will he left all his property to his second wife, and appointed her executrix. On his death the fund became distributable:—*Held*, that the fund went to the persons who would have been entitled thereto if the first wife had died a spinster, and not to her infant children. *Hardman* v. *Maffett* (13 L. R. Ir. 499), followed; *Stoddart* v. *Saville* ([1894] 1 Ch. 480), distinguished. *In re Deane's Trusts*; *Dudley* v. *Deane* - - - - M. R. 332

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SOLICITOR—Lien for costs—Transfer of carriage - - - - - - 211
See SOLICITOR'S LIEN.

SOLICITOR'S LIEN—*Land Judge's Court—Practice—Transfer of carriage—Handing over of papers.*] The representatives of a deceased solicitor, who had carriage of the proceedings, are not entitled to retain the papers in the matter as security for his costs, but must hand them over, subject to lien, to the solicitor to whom carriage is transferred. *In re Wade's Estate* ROSS, J., 211

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43 Geo. 3, c. 55—Defence of the Realm 464
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1 & 2 Vict. c. 56—Poor Law, s. 76 - 68
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13 & 14 Vict. c. 29—Judgment mortgage, s. 7
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TAXATION OF COSTS—*Labourers (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 53), *sect.* 34—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70) *Schedule* 2, *sect.* 29—*Costs of arbitration—Railways (Ireland) Act*, 1864 (27 & 28 *Vict. c.* 71) *sect.* 12—*Costs of conveyances—Review of taxation—Rules of the Supreme Court (Ireland) July*, 1893, *General Order LXV., Rule* 65.] Land was taken compulsorily by a sanitary authority under the Labourers (Ireland) Acts, with which the second schedule of the Housing of the Working Classes Act, 1890, is incorporated. The compensation was duly assessed by an arbitrator pursuant to the said Acts, but no application for costs was made to the arbitrator by the owner, pursuant to section 29 of the said second schedule. The title of the owner was investigated, and a conveyance executed by him to the sanitary authority. The bill of costs, furnished by the solicitor for the owner, included not only the costs of making title but also the costs of preparing for the arbitration, and attending thereat. The bill was taxed by the Taxing Master of the Court upon the requisition of the sanitary authority, pursuant to section 14 of the Railways (Ireland) Act, 1864. The items relating to the arbitration were objected to on the ground that no certificate had been obtained from the arbitrator, who alone had power to award them. The Taxing Master allowed the items:—*Held*, on an application to review the taxation, that the Court had jurisdiction under Order LXV., Rule 65 of the Rules of July, 1893, to review the decision of the Master, and that the items relating to the arbitration should be disallowed. *In re Agnew (Sanitary Officer of Castleblayney Union) to Keenan*
[M. R. 33

2. —— *Party and party—Instructions to sue—Instructions for briefs—Particulars—Fees to counsel—Expert evidence—Witnesses' expenses—Discretion of Taxing Master—Principles of taxation—Order LXV., Rule* 64, *Rules of Supreme Court (Ireland)*, 1893.] In a case of exceptional difficulty,

TAXATION OF COSTS—*continued.*

necessitating much antecedent investigation, and which involved a charge of forgery, after a protracted hearing before the Master of the Rolls an order was made directing an issue to be tried on the question of forgery. The case resulted in a verdict for plaintiffs, who were the assignees in bankruptcy of *J.* On the taxation of costs between party and party, the plaintiffs claimed a ump sum of £125 for instructions to sue. The Taxing Master made a ruling for particulars, and particulars were furnished claiming for certain steps and proceedings in the bankruptcy matter of *J.*, taken prior to the institution of the action. The Taxing Master disallowed these charges as against the opposite party, and allowed 10*s.* for instructions to sue:—*Held*, on motion for review of taxation, that the fee of 10 shillings was quite inadequate, considering the nature and circumstances of the case, and that the matter should be referred back to the Taxing Master with a direction to allow a reasonable remuneration (ascertained with due regard to the fees fixed by the scale for solicitor's time) for the time which he should be satisfied was actually and reasonably occupied by the solicitor in person or by his clerks in acquiring the information necessary for the case; and that if the Taxing Master required particulars there should be a request to furnish them on this basis, as a bare direction to furnish particulars was insufficient. A similar direction was given in reference to a claim for £300 for instructions for brief on the original hearing, as to which the Taxing Master had allowed £50. The Court refused to interfere with the discretion exercised by the Taxing Master in disallowing a fourth counsel, or in the reduction of refresher fees. The solicitor of the plaintiffs paid a fee of 50 guineas to each of two senior counsel, and 40 guineas to junior counsel on the hearing before the Master of the Rolls, and further fees of a similar amount to each counsel on the trial of the issue. The Taxing Master allowed, in each case, 35 guineas to senior counsel and 25 guineas to junior counsel. *Held*, that the Court, taking into consideration both the proceedings on the trial and the issue, would not interfere with the ruling of the Taxing Master as regards the briefs on the first hearing; but that the full fee of 50 guineas should be allowed to each senior counsel and a proportionate fee to junior counsel on the trial of the issue. Expenses of expert witnesses, in their character as such, cannot be allowed as between party and party on a rate exceeding that fixed by the scale relating thereto. *Maconchy* v. *Bank of New Zealand* [M. R. 22

3. —— *Solicitors' Remuneration Act*, 1881—*General Order*, 1884—*Building lease—Scale of charges.*] Lease for 700 years, at the yearly rent of £50, with a covenant on the part of the lessee to

TAXATION OF COSTS—*continued.*

expend within five years the sum of £500 in building and effecting permanent improvements: buildings or improvements made with corrugated iron to be deemed permanent improvements; and also a covenant to keep the premises and improvements in repair, and a covenant to insure:—*Held*, that such a lease was a building lease within the General Order, 1884, made under the Solicitors' Remuneration Act, 1881. *Hall to Sutton* V.-C. 137

4. —— *Solicitors' Remuneration Act*, 1881—*General Order*, 1884, *Schedule* 1, *Part II.*, *Rule* 5—*Scale fee—Lease "not at a rackrent"—Fine.*] A firm of solicitors, acting for the lessor, prepared, settled, and completed a lease of premises for a term of one hundred years, in consideration of a fine of £500 and a rent of £30 per annum: no abstract of title was made out. *Held* by the Court of Appeal (Fitz Gibbon, L. J., *diss.*) that the solicitors were entitled to charge £10, being the scale fee on the rent reserved, and also £7 10*s.*, being the scale fee on the fine, the fine being treated as if it were the purchase-money paid on a sale. *Held* by Fitz Gibbon, L. J., that the lease was not "a long lease, not at a rack-rent," and that the solicitor was therefore entitled to 30*s.* per £100 on the fine, *i.e.*, £7 10*s.*, and to £7 10*s.* per cent. on the rent of £30, *i.e.*, £2 5*s.* *In re Robson* (45 Ch. D. 71) followed; *Ex parte Ferguson* (21 L. R. Ir. 392) dissented from. *Ex parte Connolly to Sheridan and Russell* - - - - - - App. 1

TENANT FOR LIFE.

See Estate for Life.

TENANT IN TAIL.

See Estate Tail.

TITHE RENTCHARGE—*Deduction of poor-rate from*—1 & 2 *Vict. c.* 56, *s.* 76—*Local Government Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 54.] The owner of tithe rentcharge is not entitled to claim payment without deduction of poor-rate. *In re Duggan's Estate* - - - - - App. 68

TOLLS—Mortgage—Borrowing powers—Interest—Priority - - - - 85, 103

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TRADE—Administrator carrying on—Rights of creditors against assets - - 367

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TRADE NAME—*Name indicating manufacturer—Two firms of same surname—Name identified with manufacturer of one—Right to exclusive use of—User without qualifying words—Tendency to deceive.*] A distillery in Dublin was carried on under the name of John Jameson & Son until 1891, when the firm was converted into a limited liability Company under the name of John Jameson & Son, Limited (the plaintiffs). Another distillery, founded about the same period in Dublin, was carried on under the name first of William Jameson, then of Jameson and Robertson, and finally of William

TRADE NAME—*continued.*
Jameson and Company, until 1889, when, with two other distilleries, it was acquired by the defendants, the Dublin Distillers' Company, Limited. Previous to that date the labels used for whiskey made at this distillery bore the name "William Jameson & Co." or "W. Jameson & Co.," but in 1898 the defendants altered the label, substituting for those words the description "Jameson's Whiskey." The plaintiffs thereupon required the defendants to revert to the former words, and describe their whiskey as "William Jameson & Co.'s," or even as "Wm. Jameson & Co.'s." The defendants declined to do this, but offered to insert the letter "W." before "Jameson's." In an action to restrain the defendants from selling their whiskey under the name of "Jameson's Whiskey," without the prefix "William" or some other distinctive indication that the whiskey was not that manufactured by the plaintiffs, the Court was of opinion on the evidence that the name "Jameson's Whiskey" had become so identified with the plaintiffs' whiskey, that the use of it by the defendants, without qualifying words to show that the article was their own make, was likely to mislead purchasers into the belief that it was the "Jameson's Whiskey" made by the plaintiffs; that there was not any indication on the labels that the defendants' whiskey was that made at the distillery of William Jameson & Co., and that the defendants' conduct was likely and tended to so mislead:—*Held*, that the plaintiffs were entitled to an injunction. *Jameson* v. *Dublin Distillers Co.* [V.-C. 43

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—— Market—Statutory power to mortgage tolls—Interest—Priority - - 85, 103
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—— Will—Issue—*Persona designata* - 386
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—— Class - - - - - - - 213
See RESIDUARY GIFT.

—— *Persona designata*—Eldest male issue—Vesting - - - - - - 386
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—— Priority—Compromise—Costs of probate suit
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—— Residuary gift—Lapsed and revoked shares of particular residue - - 213
See RESIDUARY GIFT.

—— Two residuary gifts — Lapse — Words "not hereinbefore disposed of" - 342
See RESIDUARY GIFT.

WINDING-UP—*Company—Creditor — Proof of debt—Amount—Period of ascertainment.*] Where a creditor proves for a debt against a company, which is being wound up under the Companies Act of 1862, the amount of the proof, on which dividends are to be paid, is to be ascertained when the claim is filed, and without regard to payments made by third parties after the sending in of the claim and before adjudication thereon. *In re Ligoniel Spinning Co.; Exparte Bank of Ireland* [V.-C. 324

—— Calls—Arranging debtor - - 250
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THE END.

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